Supreme Court, U.S.
FILED
NOV 19 2004
OFFICE OF THE CLERK

No. 04-698

In The

Supreme Court of the United States

BRIAN SCHAFFER, a minor by his parents and next friends, JOCELYN AND MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County Public Schools, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, when parents of a disabled child and a local school district reach an impasse over the child's individualized education program, either side has a right to bring the dispute to an administrative hearing officer for resolution. At the hearing, which side has the burden of proof – the parents or the school district?

LIST OF PARTIES

The petitioners are Jocelyn Schaffer and Martin Schaffer, appearing in their own right and as parents and next friends of their son, Brian Schaffer.

The respondents are Jerry Weast, Superintendent of the Montgomery County Public Schools, and the Board of Education of Montgomery County, Maryland.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS WHY THE WRIT SHOULD BE GRANTED	16
I. THE DECISION BELOW EXACERBATES A MAJOR SPLIT AMONG THE CIRCUITS	17
Courts Placing the Burden on Parents	17
Courts Placing the Burden on the School District	21
II. ALLOCATING THE BURDEN OF PROOF IN IDEA CASES IS AN IMPORTANT ISSUE THAT THIS COURT SHOULD DECIDE	27
III. THIS PETITION PRESENTS AN IDEAL VEHICLE FOR DECIDING HOW TO ALLOCATE THE BURDEN OF PROOF	29
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986) 18, 19, 20

Beth B. v. Van Clay, 282 F.3d 493 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002) 13, 23

Blackmon v. Springfield R-XII School District, 198 F.3d 648 (8th Cir. 1999) 24

Board of Education v. Rowley, 458 U.S. 176 (1982) 26

Brian S. v. Vance, 86 F. Supp. 2d 538 (D. Md. 2000) 1

Brown v. Board of Education, 347 U.S. 483 (1954) 16

Carlisle Area School District v. Scott P., 62 F.3d 520 (3d Cir. 1995) 23

Clyde K. v. Puyallup School District No.3, 35 F.3d 1396 (9th Cir. 1994) 23, 24

Cordrey v. Eucker, 917 F.2d 1460 (6th Cir. 1990) 19, 20

Covington v. Knox County School System, 205 F.3d 912 (6th Cir. 2000) 18

Doe v. Board of Education of Tullahoma City, 9 F.3d 455 (6th Cir. 1993) 20

Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990) 19, 20

E.S. v. Independent School District Number 196, 135 F.3d 566 (8th Cir. 1998) 23, 24

TABLE OF AUTHORITIES – Continued

Page

Grim v. Rhinebeck Center School District, 346 F.3d 377 (2d Cir. 2003) 22

Johnson v. Independent School District No. 4, 921 F.2d 1022 (10th Cir. 1990) 20, 21

Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) 12

L.B. v. Nebo School District, 379 F.3d 966 (10th Cir. 2004) 13

Lascari v. Board of Education of Ramapo Indian Hills Regional High School District, 560 A.2d 1180 (N.J. 1989) ..... *passim*

Loren F. v. Atlanta Independent School System, 349 F.3d 1309 (2003) 13

M.C. v. Voluntown Board of Education, 226 F.3d 60 (2d Cir. 2000) 22

M.S. v. Yonkers Board of Education, 231 F.3d 96 (2d Cir. 2000) 22

Matter of the Application of a Handicapped Child, 22 Educ. Dep't Rep. 487 (1983) 22

McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985) 24

Murray v. Montrose County School District RE-1J, 51 F.3d 921 (10th Cir. 1995) 21

Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993) 22, 23, 26

Schaffer v. Vance, 2 Fed. Appx. 232 (4th Cir. 2001) 2, 11

TABLE OF AUTHORITIES – Continued

Page

School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985) 7

Scorah v. District of Columbia, 322 F. Supp. 2d 12 (D.D.C. 2004) 25

Sherman v. Mamaroneck Union Free School District, 330 F.3d 87 (2d Cir. 2003) 22

Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983) 18, 19, 20

Walczak v. Florida Union Free School District, 142 F.3d 119 (2d Cir. 1998) 21, 22

Weast v. Schaffer, 377 F.3d 449 (4th Cir. 2004) 2

Weast v. Schaffer, 240 F. Supp. 2d 396 (D. Md. 2002) 2

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 7

FEDERAL STATUTES

20 U.S.C. § 1400 2

20 U.S.C. § 1400(d)(1)(A) 3

20 U.S.C. § 1414(d) 3

20 U.S.C. § 1415 2

20 U.S.C. § 1415(c)(8)(A) 15

20 U.S.C. § 1415(f) 2

20 U.S.C. § 1415(i)(2)(A) 4, 9, 11

28 U.S.C. § 1254 2

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

34 C.F.R. § 300.7(c)(9) 4

34 C.F.R. § 300.507(a)(1) 4

34 C.F.R. § 361.57(g) 4

D.C. Mun. Regs. tit. 5, § 3030.3 (2004) 25

OTHER

Engel, *Culture, and Children with Disabilities*, 1991 Duke L. J. at 187-94 12

GAO, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate (Sept. 2003) 27, 28

J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999) 14

S. Rep. No. 94-168, 94th Cong. 2d Cong. Sess. 25-27, *reprinted in* 1975 *U.S. Code Cong. & Admin. News* (89 Stat.) 1449-50 26

PETITION FOR WRIT OF CERTIORARI

The petitioners – parents of a disabled child – respectfully petition the Court for a writ of certiorari to review the judgment of the court of appeals, which ruled that parents – rather than the school district – must bear the burden of proof at an administrative hearing, held under the Individuals with Disabilities Education Act, to assess the appropriateness of an individualized education program.

OPINIONS BELOW

There are six opinions below, culminating in the court of appeals ruling that is the subject of this petition. In chronological order, they are as follows:

- In 1998, the administrative law judge ("ALJ") imposed the burden of proof on the parents and ruled for the school district on the merits of the child's individualized education program ("IEP"). This unpublished decision is reprinted in the Appendix at App. 113.

- In 2000, the district court reversed the ALJ on the burden of proof issue, placed the burden on the school district, and remanded the case for further proceedings. This decision is published as *Brian S. v. Vance*, 86 F. Supp. 2d 538 (D. Md. 2000). It is reprinted at App. 54.

- In 2000, with the burden of proof placed on the school district, the ALJ ruled for the parents on the merits, holding that the IEP proposed by the school district was inappropriate. This unpublished decision is reprinted at App. 70.

- In 2001, without deciding the burden of proof issue, the court of appeals vacated the district court's 2000 decision and remanded the case for further proceedings.

The opinion is found at *Schaffer v. Vance*, 2 Fed. Appx. 232 (4th Cir. 2001) (*per curiam*). It is reprinted at App. 50.

- In 2002, the district court again placed the burden of proof on the school district, and it affirmed the ALJ's 2000 ruling for the parents on the merits. This opinion is published as *Weast v. Schaffer*, 240 F. Supp. 2d 396 (D. Md. 2002). It is reprinted at App. 21.

- Finally, in 2004, a divided court of appeals reversed the district court on the burden of proof issue, imposed the burden on the parents and remanded the case. This decision – the subject of this petition – is published as *Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004). It is reprinted at App. 1. The dissent of Judge Luttig is reprinted at App. 16.

An unpublished denial of rehearing *en banc* is reprinted at App. 164. An order of the district court – following remand – to stay proceedings in that court pending disposition of this petition is reprinted at App. 163.

JURISDICTION

The panel decision of the court of appeals was entered on July 29, 2004. The decision of the court of appeals denying the petition for rehearing *en banc* was entered on August 24, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

This case arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* Reprinted in the Appendix is § 1400, which contains congressional findings as well as the purpose of the IDEA. App. 166. Also reprinted is § 1415, which contains procedural safeguards, including the § 1415(f) requirement for

an "impartial due process hearing." App. 174. The IDEA is silent on the burden of proof at such a hearing.

STATEMENT OF THE CASE

Under the IDEA, Congress provides money to the States to "ensure that all children with disabilities have available to them a free appropriate public education ['FAPE'] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A). Those funds are then re-allocated to local school districts for use in defraying costs of their special education programs. Along with the federal funds comes an obligation for the school system to abide by certain procedural and substantive standards in developing individualized education programs ("IEPs") for children with disabilities.[1]

The procedural standards preclude school officials from making unilateral decisions about a child's IEP. Instead, such decisions must be made by school officials and parents in collaboration, with both parties having significant rights of appeal through administrative and judicial channels. If the parents and the school district reach an impasse over the contents of an IEP, either side may initiate an administrative proceeding – an "impartial due process hearing" – to bring the issue before a neutral

[1] The IEP is a written document developed by an IEP team that includes, *inter alia*, the child's parents, his teacher and local school division representatives. 20 U.S.C. § 1414(d). The IEP contains a statement of how the child's disability affects the child's involvement and progress in the general curriculum, a description of specific educational services to be provided to the child, annual goals, and objective criteria for evaluating progress. *Id.*

hearing officer or administrative law judge for resolution.[2] Any party aggrieved by the results of the administrative hearing may appeal to a state court of competent jurisdiction or to a federal district court.[3]

The Petitioners' Child

There is "no question" that Brian Schaffer has multiple disabilities. App. 56. He is "learning disabled, language-impaired and other health impaired." App. 24.[4] In addition, he has Attention Deficit Hyperactivity Disorder. App. 24.[5] From pre-kindergarten through the seventh grade, Brian attended an independent school, Green Acres School.[6] The tuition was paid by his parents, Jocelyn

[2] 34 C.F.R. § 300.507(a)(1) ("A parent or a public agency may initiate a hearing on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).").

[3] *See* 20 U.S.C. § 1415(i)(2)(A). States may elect to use an administrative review as an intermediate step between the due process hearing and judicial review. 34 C.F.R. § 361.57(g). However, Maryland has not implemented this option.

[4] The term "other health impairment" incorporates a broad array of disabilities. Defined by federal regulation, the term means:

> having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that –
>
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and
>
> (ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.7(c)(9).

[5] Now 20, Brian was only 14 when this case began. App. 118, 133.

[6] Like his older brother and sister, Brian eventually attended – and ultimately graduated from – the public schools of Montgomery County.

(Continued on following page)

Schaffer and Martin Schaffer. At Green Acres School, Brian had the benefit of small class size and significant accommodations, as well as extra services provided by his parents. Despite these services, he did not succeed. App. 24. In the fall of 1997, when Brian was in the seventh grade, Green Acres School concluded that he should attend a school that could more adequately accommodate his disabilities. App. 120. It was then that Brian's parents turned to the Montgomery County Public Schools ("the school district") and began to seek an appropriate placement for the following school year. App. 24.

The school district agreed that, under the IDEA, it was obligated to provide Brian with special education and related services. Even so, the school district rejected the conclusions of the outside experts who had evaluated Brian and the recommendations of the Green Acres teachers who had worked with him. Instead, the school district accepted the rosier and less informed views of its own employees, who had never taught the child.[7] Thus, there was disagreement about the nature of Brian's disabilities and, as a result, there also was disagreement about the services he required.

However, given the initial failure of the school district to provide an adequate IEP, his public school attendance came several years after the events giving rise to this case, when the school district's reviewing team finally decided that Brian's parents and outside experts had been correct in their insistence that Brian needed small classes. *See* Record, Docket Entry 41 (Dec. of J. Schaeffer and Exhibits); Docket Entry 45 (Mot. for Sum. J. at 22 n.7).

[7] The ALJ later faulted the school district because "[its] expert made no effort to contact the Parents' experts and discuss the reports and recommendations [of the parents' experts]. Lack of contact by [the school district's] experts with the Parents' experts may have played a role in the failure by [the school district] to develop an IEP appropriate to the Child's educational needs and offer an appropriate placement." App. 157.

According to the outside experts, Brian suffered from a "unique central auditory processing deficit." App. 151. Thus, he needed "small, self-contained special education classes" that would "minimize the distractions interfering with his ability to learn." App. 25.[8] This finding was consistent with Brian's experience at Green Acres School, where he performed much more successfully in a class of 7 or 8 students than he did in his other classes, which did not exceed 15 to 16 students. *See* Record, Hearing of June 16, June 23, and July 2, 1998, before ALJ Stephen J. Nichols, Transcript 143, 530-31, 559, 574-77.

By contrast, the school district's employees did not believe that Brian had a central auditory processing problem.[9] In their view, he only had a "mild speech-language disability" and, thus, did not need the more intensive accommodations recommended by the outside experts. App. 26. As a result, the IEP proposed by the school district called for Brian to be taught most of his academic subjects in a large classroom with 24-28 other students. For some subjects, the school district simply planned to place Brian in a regular classroom. App 133. For other subjects, his classroom would use an "inclusion model" with two teachers, one of whom would work with 5-6 special education students in the midst of the other students and larger setting. App. 130. The larger class size and "inclusion model" formed the centerpiece of the IEP offered by the school district. *See* App. 130-134.

In light of Brian's severe learning deficits and the advice of those experts most familiar with him, the parents advised the school district that its IEP was "insufficient to meet his identified needs." Rejecting the proposed

[8] A discussion of the outside experts by the ALJ appears at App. 121-23, 134, 146-52.

[9] A discussion of the school district's experts by the ALJ appears at App. 126-27, 146-52.

IEP in May of 1998, Brian's parents requested an administrative due process hearing. App. 25. Anticipating a protracted dispute, they also enrolled Brian for the 1998-99 school year at the McLean School, where they had previously reserved a space. McLean is a private school in Montgomery County that accommodates learning and language-disabled students in small classes. App. 25.

Because the school district did not offer Brian an appropriate education in the public schools, Brian's parents sought reimbursement from the school district for the tuition and expenses they paid to the McLean School.[10] App. 22. *See School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985) (holding that IDEA authorizes a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."). Brian's parents also pursued their claim in order to obtain a favorable decision that would enable their child to receive an appropriate education from the school district in the coming years.

The ALJ's First Decision

The administrative hearing lasted three days. As directed by the ALJ, each side filed briefs on the burden of proof. App. 57. Each side argued that the burden should be borne by the other. Each side also presented

[10] Although Brian graduated from high school in 2003 and is no longer eligible for IDEA services, this case nonetheless presents a continuing controversy because petitioners seek reimbursement for the costs they incurred in providing their son the appropriate education services that the school district refused to provide. These costs total thousands of dollars for eighth grade alone. *See Zobrest v. Catalina Foothills Sch. District*, 509 U.S. 1, 4 n.3. (1993) (holding that claim for reimbursement preserves case as live controversy despite student's graduation).

expert testimony supporting its position on the merits. The outside experts, Brian's parents and educators from Green Acres School explained that the school district's plan was deficient; the school district's witnesses disagreed. After weighing the conflicting evidence, the ALJ concluded that the outcome of the case depended on which side had the burden of proof:

> There are experts on both sides in this case who have testified with opposing points of view. The credentials of all of those experts, in their respective fields, were impressive. Because each side's experts have diverging views on the question of what the Child's needs were and which placement would afford the requisite educational benefit for the Child, *an assignment of the burden of proof in this case becomes critical.*

App. 94 (emphasis added).

The ALJ recognized that "[t]here is no clear authority" on who bears the burden of proof and that "[t]he case law provides support for assigning that burden to either party." App. 94. Outlining a split that has now grown much wider, the ALJ noted that some circuits place the burden of proof on the school district. *Id.* On the other hand, he explained, other circuits place the burden on the parents. App. 94-95. Confronted by the conflicting authorities, the ALJ elected the latter course and concluded that "the *Parents* bear the burden of persuasion." App. 96 (emphasis added). Thus, the petitioners were required to show that the IEP prepared by the school district did not offer Brian a FAPE. Having thus imposed the burden of proof on Brian's parents – and viewing the burden as "critical" to the outcome – the ALJ then concluded that the parents had failed to meet their burden. App. 106. Thus, he ruled for the school district on the merits of the case, approving the school district's plan for Brian and denying the parents' request for tuition reimbursement. App. 107.

The District Court – First Decision

Brian's parents appealed the ALJ's decision to the United States District Court for the District of Maryland.[11] There they prevailed. Reversing the ALJ on the burden of proof issue, the district court placed the burden on the school district and remanded the case back to the ALJ for further proceedings under the corrected standard. In so ruling, the district court relied heavily on an IDEA case decided by the New Jersey Supreme Court, *Lascari v. Board of Education of Ramapo Indian Hills Regional High School District*, 560 A.2d 1180, 1188 (N.J. 1989).[12]

Lascari is a seminal case explaining why the school district should *always* bear the burden of proof. Even so, on the facts before it, the district court found that it did not need to go so far as *Lascari*. Adhering to a middle course, the district court distinguished between two types of cases – those involving an *initial* IEP and those involving a proposed change to an *existing* IEP. With regard to an initial IEP, the district court ruled that *the school district* should have the burden of proof at the administrative hearing. However, "where a party – either the parents or the school district – seeks to change an existing IEP, the burden at the due process hearing fairly lies with the party seeking the change." App. 68. This distinction was later obliterated by the sweeping language of the Fourth

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[11] *See* 20 U.S.C. § 1415(i)(2)(A) ("Any party aggrieved by the findings and decision . . . [of an ALJ], shall have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy."). It is this statute that provided the basis of jurisdiction for the original action in district court.

[12] All but ignored by the two judges forming the Fourth Circuit majority, *Lascari* figures prominently in the split among lower courts. *See infra* at 25.

Circuit, which apparently places the burden on the parents in *all* cases when they challenge a proposed IEP. *See infra* at 14.

The ALJ's Second Decision

When the remanded case came back to the ALJ, no new evidence was presented. Thus, the "weight of the evidence" again "rest[ed] in equipoise." App. 148, 152. With the burden now shifted to the school district, the ALJ ruled for the parents, concluding that the IEP failed to provide Brian with meaningful educational benefit. App. 153. As the ALJ explained, "[Brian's] learning disability, his distractibility, and his auditory processing skills deficit dictate that he be in small classes for all his academic subjects; large classes are not appropriate for the Child." App. 134.[13] Thus, the ALJ concluded:

> [A]s a matter of law . . . [1] the April 6, 1998 IEP was not reasonably calculated to provide "significant learning" and "meaning[ful] educational benefit" and [2] the placement(s) offered by [the school district] were not appropriate and failed to afford the Child an opportunity for a FAPE for the 1998-1999 school year as required by [the] IDEA.

App. 158. Having ruled that the school district's plan was inadequate, the ALJ awarded the parents *half* of the tuition they expended to obtain an appropriate placement for Brian for the 1998-99 school year. App. 158. Neither

[13] The ALJ also determined that the "inclusion model" proposed by the school district actually would be counter-productive. App. 134. He also found that the school district's proposal fell short in other ways. For example, "[t]he IEP had no goals to address [Brian's] severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem." App. 134-35.

side found this decision satisfactory, and both appealed to the district court.[14] Meanwhile, other proceedings were underway in the court of appeals.

The Court of Appeals – First Decision

While the case was before the ALJ on remand, the school district was simultaneously appealing the district court's 2000 decision to the Fourth Circuit. Although not critical to the outcome, this stage of the litigation is significant because of the involvement of the United States. Filing an *amicus* brief in support of the parents, the United States argued that the burden should be placed on the school district.[15] To do otherwise, the United States said, would "unhinge [the] statutory framework" created by Congress. Brief for *Amicus Curiae* United States ("U.S. *Amicus* Brief") at 5, *Schaeffer v. Vance*, 2 Fed. Appx. 232 (4th Cir. 2001) (No. 00-1471). The government gave two overarching reasons for placing the burden of proof on the school district.

First, the United States concluded that such an approach furthers the IDEA's goal of providing a free appropriate public education to children with disabilities. U.S. *Amicus* Brief at 6. As the government explained:

- "[A]llocating the burden of proof to the parents would undermine the IDEA's provisions that ensure parents meaningful participation in developing the IEP."

[14] As in the first appeal to the district court, the basis for jurisdiction was 20 U.S.C. § 1415(i)(2)(A). *See* n.11, *supra*.

[15] The United States has not participated in later stages of the case.

- "[A]ssigning the burden of proof to the school is consistent with the IDEA's overall objective . . . by serving as an additional incentive for school officials to draft IEPs that provide FAPE to children with disabilities."
- "[B]ecause the IDEA contemplates that the school would take the lead in . . . proposing an appropriate educational plan, it is entirely consistent with the statutory scheme to also require that the school be able to prove at the due process administrative hearing that the proposed IEP will provide FAPE to a child with a disability."

Id. at 12.

Second, the United States noted that principles of fairness support allocating the burden to the party with greater access to necessary evidence. U.S. *Amicus* Brief at 14. As the government explained:

> [C]ourts have often allocated the burden of proof to the party other than the one challenging an agency action in order to accommodate statutory priorities or to protect certain interests, in accordance with the Supreme Court's general standard allowing burden shifting according to "policy and fairness based on experience."

Id. at 13-14 (quoting *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973)). Protecting those interests in the context of the IDEA means placing the burden of proof on the school district because "the school is in a better position to prove the appropriateness of its proposed IEP." U.S. *Amicus* Brief at 16.[16]

[16] The United States relied, in part, on Engel, *Culture, and Children with Disabilities*, 1991 Duke L. J. at 187-94 (arguing that parents are generally at a disadvantage vis-a-vis the school when

(Continued on following page)

By the time the court of appeals heard oral argument, the ALJ had already ruled in favor of the parents. Given this development, the court of appeals chose not to address the burden of proof until after the district court could hear an appeal from that ALJ ruling. Thus, the court of appeals vacated the district court's decision and remanded the case "with directions that any issue with respect to the proof scheme in this case be consolidated with the consideration on the merits." App. 52.

The District Court – Second Decision

The case then came back before the district court, with the remand from the court of appeals linking up with cross-appeals from the ALJ's second decision. On cross-motions for summary judgment,[17] the district court again ruled that, because the case involved "the parent's disagreement with an initial IEP," the school district had the burden of proof. The court supported the conclusion with the same rationale found in its first decision. App. 32. Concluding that the school district "did not provide Brian with FAPE for 1998-99," the court awarded the parents

disputes arise under IDEA because parents generally lack specialized training and because their views are often treated as "inherently suspect" due to the attachment to their child). U.S. *Amicus* Brief at 16.

[17] When an IDEA case is heard on appeal by a district court, the parties typically use cross-motions for summary judgment as the procedural mechanism to bring forward their competing claims for judgment based on the administrative record. This is so even when that record contains conflicting evidence. *See, e.g., Beth B. v. Van Clay*, 282 F.3d 493, 496 n.2 (7th Cir. 2002) ("Due to the unique procedural posture of these cases . . . summary judgment has been deemed appropriate even when facts are in dispute. . . ."); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004) (same); *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1313 (2003) (same). Use of this procedure is not an issue in this case.

full reimbursement for the tuition they paid in the 1998-99 school year. App. 41, 47. The school district then appealed to the Fourth Circuit, challenging the allocation of the burden of proof.

The Court of Appeals – the Decision at Issue

On appeal, the Fourth Circuit noted that the circuits are deeply split on how to allocate the burden of proof in administrative hearings under the IDEA. According to the panel majority, "[t]hree circuits assign the burden to the parents, and four (perhaps five) assign it to the school system." App. 7. Siding with the minority view, the divided panel reversed the district court and held – without qualification – that "parents who challenge an IEP have the burden of proof in the administrative hearing." App. 16.

In reaching this result, the panel majority began by recognizing a general principle governing the allocation of burdens of proof. It said: "Although 'the *natural tendency* is to place the burden[] on the party desiring change' or seeking relief, *other factors* such as policy considerations, convenience, and fairness may allow for a different allocation of the burden of proof." App. 6 (emphasis added) (quoting J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999)). Despite the precedents and "other factors" urged by Brian's parents, the majority "[saw] no reason to depart from the general rule that a party initiating a proceeding bears [the] burden [of proof]." App. 15. Thus, it ruled for the school district and remanded the case back to the district court.

Judge Luttig dissented. Starting with the same general principle as the panel majority, he reached the diametrically opposite result. In his view, "[e]ach of these 'other factors' – policy, convenience and fairness – weigh against the assignment of the burden of proof to the

parents. . . ." App. 17. Agreeing with the district court, he concluded that "the school district – and not the comparatively uninformed parents of the disabled child – must bear the burden of proving that the disabled child has been provided with the statutorily required appropriate educational resources." App. 16.

Judge Luttig also criticized the majority for being "unduly influenced" by the knowledge and sophistication of Brian's parents. App. 20. He explained that, for the "vast majority" of parents with disabled children, the IEP proposed by the school district will be "resistant to challenge" and the IDEA "will likely be obscure if not bewildering." *Id.* Moreover, unlike many other civil rights statutes, the IDEA "imposes an *affirmative obligation* on the nation's school systems to provide disabled students with an enhanced level of attention and services." App. 18 (emphasis in original). Judge Luttig's recognition of this affirmative obligation dovetails with congressional finding that minority children with disabilities face special challenges. *See* 20 U.S.C. § 1415(c)(8)(A) ("[G]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities."). Thus, "[w]ith the full mix of parents in mind," and realistically assessing the opposing parties relative abilities to present evidence and prove their case, Judge Luttig dissented from the panel majority. App. 20. Aligning himself instead with the majority of circuits, he concluded that "the proper course is to assign the burden of proof in due process hearings to the school district." *Id.*

Following the panel decision, the court of appeals denied a petition for rehearing *en banc*. App. 164. Upon remand, the district court stayed further proceedings pending disposition of this petition. App. 163.

REASONS WHY THE WRIT SHOULD BE GRANTED

"[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

***Brown v. Board of Education*, 347 U.S. 483, 493 (1954).**

This case implicates the right of parents to obtain a free appropriate public education for their children with disabilities. It is a right once denied by many local school districts, but now firmly grounded in federal law – the IDEA. It is, however, a right that is meaningful only if parents are able to hold local school districts accountable at the administrative hearings that are made available under that law.

The ability of parents to hold school districts accountable is greatly affected by the answer courts have given to the question presented by this petition: which side has the burden of proof? Do the parents bear that burden? Or, is it more appropriate to place that burden on the school districts, which have the expertise to explain their decisions as well as an affirmative obligation to provide disabled children with education programs tailored to their individual needs?

It is a question that the IDEA does not explicitly address and on which the lower courts have given conflicting answers. The majority rule – adopted by six circuits and by the Supreme Court of New Jersey – is that the burden is rightfully placed on the school district. The minority rule – now adopted by four circuits – places the burden of proof on the parents. It is a question that this Court should now address.

There are three reasons why this petition should be granted. First, the lower courts are deeply divided on an

issue of federal law. This fact alone makes this petition a worthy candidate for certiorari. Sup. Ct. Rule 10(a). Second, the issue is an important one, implicating the civil rights of those parents and children who depend upon the IDEA to obtain real educational opportunity. More than 3,000 administrative hearings are held under the IDEA each year. Many more are requested but ultimately cancelled when parents assess the difficulty of the process. And still many more children are affected by the parties' awareness of who will bear the burden of proof if negotiations fail. Third, this petition presents an ideal vehicle for resolving the issue. The split is mature. The case is not cluttered by collateral issues. The decision below – with its majority opinion and its dissent by Judge Luttig – neatly frames the issue for resolution by this Court.

I. THE DECISION BELOW EXACERBATES A MAJOR SPLIT AMONG THE CIRCUITS.

Ten circuits have addressed the question presented by this petition. Four circuits – now including the Fourth Circuit – have ruled that the burden of proof rests on the disabled child's parents. Six circuits have ruled that the burden rests on the school district. Additionally, in a decision distinguished by its depth of analysis, the New Jersey Supreme Court has placed the burden of proof on the school district. This is a deep split that should be resolved by this Court.

Courts Placing the Burden on Parents –

Before adding its own decision to the list, the Fourth Circuit recognized that three circuits place the burden of

proof on the parents in administrative hearings under the IDEA.[18] These circuits are the Fifth, Sixth and Tenth.

Fifth Circuit – The first decision by the court of appeals addressing the burden of proof was *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part and rev'd in part sub nom., Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).[19] There the Fifth Circuit actually placed the burden on the *school district* because it was the party seeking to change a previously agreed-upon IEP. As the court explained:

> [B]ecause the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate. Since the school district has not even attempted to do so, its argument must be rejected . . .

Tatro, 703 F.2d at 830. In other words, *Tatro* treated the IEP as presumptively correct because it represented a bilateral agreement.

Three years later, the Fifth Circuit decided *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153 (5th Cir. 1986). Like *Tatro*, the

[18] The federal law now known as the IDEA has been known by other names since it was first adopted in 1975, including the Education of the Handicapped Act (EHA) and the Education of All Handicapped Children Act (EAHCA). For the sake of consistency, this petition refers to the federal law as "the IDEA," even when the cited case uses one of the law's former names. This approach mirrors the one followed implicitly by the decision below and followed by other circuits as well. *See, e.g., Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 915 n.2 (6th Cir. 2000) (explicitly adopting this approach to statutory nomenclature).

[19] The burden of proof was not an issue addressed by this Court when it ruled in the *Tatro* case.

Alamo Heights case involved an attempt to modify an existing IEP; however, this time it was the parents who sought the change, and it was the parents who bore the burden. The Fifth Circuit declared:

> [T]he Act creates a "presumption in favor of the education placement established by [a child's] IEP," and "the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate."

Id. at 1158 (quoting *Tatro*, 703 F.2d at 830) (second brackets added by Fifth Circuit). Although the Fifth Circuit explained its decision by quoting from *Tatro*, it failed to recognize that a major change was afoot. In *Alamo Heights*, the rationale for treating an IEP as presumptively correct was fundamentally altered. Where *Tatro* relied on the fact that the IEP was "jointly developed by the school district and the parents," *Alamo Heights* relied on what it called "the expertise of local education authorities." 790 F.2d at 1158. In other words, under *Alamo Heights*, an IEP must be treated as presumptively appropriate simply because the school district *says* it is appropriate. Bilateralism has been replaced by unilateralism. As a result, the Fifth Circuit is now among those circuits that always impose the burden of proof on parents.

Sixth Circuit – The burden of proof was first addressed by the Sixth Circuit in a pair of 1990 cases: *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990), and *Doe v. Defendant I,* 898 F.2d 1186 (6th Cir. 1990). Standing by themselves, these cases appear to say that the burden should be placed on whichever party – the parents or the school district – seeks to change a previously agreed-upon

IEP.[20] However, the Sixth Circuit later relied on these decisions to impose the burden on parents even where there was no previously existing IEP. According to the court, "[the child] and his parents bear the burden of proving by a preponderance of the evidence that the IEP devised by the Board is inappropriate." *Doe v. Bd. of Educ. of Tullahoma City*, 9 F.3d 455, 458 (6th Cir. 1993) (citing *Cordrey*, 917 F.2d at 1469; *Doe*, 898 F.2d at 1191) (emphasis added). Thus, while the rationale for its position is unclear,[21] the Sixth Circuit is plainly among those circuits that place the burden of proof on the parents.

Tenth Circuit – In *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990), the Tenth Circuit said that "the burden of proof in these [IDEA] matters rests with the party attacking the child's individual education plan." *Id.* at 1026. In explaining the reason for its position, the Tenth Circuit did no more than quote from the Fifth Circuit's opinion in *Alamo Heights*, not recognizing that *Alamo Heights* distorted the rationale previously used by the Fifth Circuit in *Tatro*. *See supra* at

[20] *See, e.g.*, *Cordrey*, 917 F.2d at 1469 ("Under this rule, [the child] and his parents would bear the burden of proof since they seek to add [extended school year] services to his IEP."); *Doe*, 898 F.2d at 1191 ("because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate") (quoting *Tatro*, 703 F.2d at 830).

[21] The decision below suggests that the Sixth Circuit imposes the burden on parents with respect to "both . . . procedural and substantive deficiencies" because that is the "traditional burden of proof." App. 7 (quoting *Cordrey*, 917 F.2d at 1466). However, a close reading of the cited passage shows that the "traditional" comment applies *only* to procedural compliance – not substantive compliance. Thus, the rationale for the Sixth Circuit's position on the burden of proof for substantive deficiencies remains elusive, and the Fourth Circuit's reliance on that position remains unpersuasive.

19. While thus adding to the number of circuits embracing the minority position, *Johnson* adds nothing to the persuasiveness of that position.[22]

Courts Placing the Burden on the School District –

The Fourth Circuit said that four – "perhaps five" – circuits place the burden of proof on the school district. App. 7. These circuits include the Second, Third, Eighth, Ninth and District of Columbia Circuits. Not mentioned by the Fourth Circuit is the Seventh Circuit, which has also said that the school district bears the burden of proof. Noted but not discussed by the Fourth Circuit is the decision by the New Jersey Supreme Court in *Lascari*, which also places the burden of proof on the school district. App. 9. Each of these seven jurisdictions will be discussed in turn.

Second Circuit – In *Walczak v. Florida Union Free School District,* 142 F.3d 119 (2d Cir. 1998), the court placed the burden of proof on the school district. As it explained:

> Parents who are dissatisfied with a proposed IEP may file a complaint with the state educational agency. . . . Complaints are resolved through an

[22] In a later case, the Tenth Circuit left open the possibility that the school district might bear the burden of proof where it is the party seeking to change a *previously agreed*-upon IEP. *See Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 930 (10th Cir. 1995) (noting that, given its disposition of the case, the court "need not decide" whether "the District bore the burden of proving that [an agreed upon placement] had become inappropriate for [the child] and that a change . . . was therefore necessary"). While this aspect of the burden of proof is not implicated by the facts of Brian's case, the Tenth Circuit's reservation on this point underscores the inappropriateness of the sweeping language used by the court of appeals in establishing a rule for the Fourth Circuit.

> "impartial due process hearing" . . . at which *school authorities have the burden* of supporting the proposed IEP. . . .

Id. at 122 (emphasis added). In imposing the burden on the school district, the Second Circuit relied on a series of administrative decisions including *Matter of the Application of a Handicapped Child*, 22 Educ. Dep't Rep. 487, 489 (1983) ("It is well established that a board of education has the burden of establishing the appropriateness of the placement recommended by [the school board]"). The Second Circuit continues to adhere to *Walczak*.[23]

Third Circuit – A leading case for placing the burden of proof on the school district is *Oberti v. Board of Education,* 995 F.2d 1204 (3d Cir. 1993). Analyzing the competing interests in some detail, the court explained:

> In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents.

[23] *See, e.g., Grim v. Rhinebeck Cent. Sch. District*, 346 F.3d 377 (2d Cir. 2003) ("[T]he school district has the burden of demonstrating the appropriateness of its proposed IEP."); *Sherman v. Mamaroneck Union Free Sch. Dist.*, 330 F.3d 87, 93 (2d Cir. 2003) ("The School District bears the burden of proving that it has met [the IDEA] requirement" that "an IEP be 'reasonably calculated' to confer 'educational benefits.'"); *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96 (2d Cir. 2000) ("The School Board shoulders the burden of proof" on "whether the IEP was 'reasonably calculated' to confer 'educational benefits.'"); *M.C. v. Voluntown Bd. of Educ*, 226 F.3d 60 (2d Cir. 2000) ("Any such complaint is resolved through an 'impartial due process hearing' . . . at which school authorities have the burden of supporting the proposed IEP.").

Id. at 1219. The court then went on to endorse the view that placing the burden of proof on the school is "consistent with the proposition that the burdens of persuasion and production should be placed on the party better able to meet those burdens." *Id.* (quoting *Lascari*, 560 A.2d at 1188).

The precise question addressed in *Oberti* was which side has the burden of proof in an appeal to the district court; however, the principles on which the Third Circuit decided that question are broad enough to govern the administrative hearing as well. Indeed, the Third Circuit has relied upon *Oberti* for the principle that "[i]n *administrative* and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed." *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995) (emphasis added) (citing *Oberti*, 995 F.2d at 1219).

Seventh Circuit – The Fourth Circuit did not list the Seventh Circuit as one of the courts that has addressed the burden of proof issue; however, the Seventh Circuit has made it clear – albeit in *dictum* – that it regards the burden as properly placed on the school district. *Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002) ("The hearing officer correctly applied the burden of proof and found that the district satisfactorily showed that its proposed IEP was adequate under the IDEA.").

Eighth Circuit – In *E.S. v. Independent School District No. 196,* 135 F.3d 566, 569 (8th Cir. 1998), the court held that "[a]t the administrative level, the [School] District clearly had the burden of proving that it had complied with the IDEA." *Id.* at 569 (citing *Clyde K. v. Puyallup Sch. Dist. No. 3,* 35 F.3d 1396, 1398-99 (9th Cir. 1994)).

The decision in *E.S.* was followed the next year by *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999), which also placed the burden on the school district: "At [the student's] administrative due process hearing the School District had the burden of proving that its proposed IEP would satisfy the requirements of the IDEA and provide [the child] with a free appropriate public education." *Id.* at 658 (citing *E.S.*, 135 F.3d at 658). Moreover, when asked to rehear the *Blackmon* case *en banc*, the Eighth Circuit declined to do so. 2000 U.S. App. LEXIS 965 (8th Cir. Jan. 25, 2000) (Nos. 99-1163/99-1288). Thus, it remains the law of the Eighth Circuit that the school district has the burden of proof.

Ninth Circuit – In *Clyde K. v. Puyallup Sch. Dist. No. 3,* 35 F.3d 1396, 1398 (9th Cir. 1994), the court entertained no doubts about where the burden of proof should be placed at a due process hearing, stating that "[t]he school clearly had the burden of proving at the administrative hearing that it complied with the IDEA." The Ninth Circuit continues to adhere to the *Clyde K.* decision that the school district has the burden of proof.

D.C. Circuit – In reviewing the split in the circuits, the court below was unsure how to treat the D.C. Circuit. Quoting *McKenzie v. Smith,* 771 F.2d 1527, 1532 (D.C. Cir. 1985), the Fourth Circuit said:

> [T]he D.C. Circuit assigned the burden of proof to a school system when an IEP was challenged as *procedurally deficient*, noting that "the underlying assumption of the Act is that to the extent its procedural mechanisms are faithfully employed, [disabled] children will be afforded an appropriate education." It is not clear how the D.C. Circuit would assign the burden in a case such as this one where only the *substance* of the IEP is challenged.

App. 8 (emphasis added) (second brackets added by Fourth Circuit). There is, however, no uncertainty. The Board of Education for the District of Columbia has, *by regulation*, recognized its obligation to bear the burden of proof. The regulation provides that, in a due process hearing, "[t]he LEA [local education agency] shall bear the burden of proof, based solely upon the evidence and testimony presented at the hearing, that the action or proposed placement is adequate to meet the educational needs of the student." D.C. Mun. Regs. tit. 5, § 3030.3 (2004).[24] Arguably, this regulatory resolution of the issue removes the District of Columbia from the score card on how the circuits are aligned. However, the fact that the District of Columbia applies the IDEA in a manner contrary to its own institutional interests reinforces the doubts about the way in which the Fourth Circuit has construed that statute.

New Jersey – The decision below not only conflicts with the decisions of six other circuits, it also conflicts with the decision of the New Jersey Supreme Court in *Lascari v. Board of Education of Ramapo Indian Hills Regional High School District,* 560 A.2d 1180, 1188 (N.J. 1989). Echoed below in Judge Luttig's dissent, *Lascari* also provided much of the analysis upon which the district court relied in placing the burden on the school district. *See* App. 36-37.

In reaching its conclusion, *Lascari* discussed the federal policy at stake: "Through [the IDEA], Congress sought to ensure that school districts would be held accountable for the proper education of handicapped

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[24] *See Scorah v. District of Columbia*, 322 F. Supp. 2d 12 (D.D.C. 2004) (applying a predecessor regulation placing burden of proof on the D.C. public school system).

children, *a task the districts had previously ignored.*" *Lascari*, 560 A.2d at 1183 (emphasis added) (citing S. Rep. No. 94-168, 94th Cong., 2d Cong. Sess. 25-27, *reprinted in* 1975 *U.S. Code Cong. & Admin. News* (89 Stat.) 1449-50; *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982)). Given this background of neglect, placing the burden on the school district is "more consistent" with the IDEA and "protects the rights of handicapped children to an appropriate education." *Lascari*, 560 A.2d at 1188. Anticipating the views later expressed by the Third Circuit in *Oberti* and by the United States in its 2000 *amicus* brief, the *Lascari* court also supported its conclusion with practical considerations:

> Our result is also consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens.
>
> * * *
>
> The school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP.
>
> * * *
>
> By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.

Id. Thus, the court concluded that "the obligation of parents at the due process hearing should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate." *Id.*

In sum, the split is not only wide, it is also deep, pitting the rationale of *Lascari* and Judge Luttig against the rationale advanced by the panel majority. It is a split this court should now resolve.

II. ALLOCATING THE BURDEN OF PROOF IN IDEA CASES IS AN IMPORTANT ISSUE THAT THIS COURT SHOULD DECIDE.

Aptly described by the United States as "an important civil rights statute," U.S. *Amicus* Brief at 1, the IDEA is the principal vehicle by which educational benefits are provided to children with disabilities. It is, therefore, especially inappropriate for the law to be applied in the patchwork fashion created by the conflicting decisions on the burden of proof. Simply put, children and parents in some States have fewer or less effectual rights than their counterparts in other States, even though all were intended to be beneficiaries of the same national law. This Court should resolve the conflict.

The need for certiorari is underscored by the large number – and broad range – of disabled students served by the IDEA. The U.S. General Accounting Office ("GAO") recently noted that, nationwide, about 6.5 million children and young adults – aged 3 through 21 – receive special education services under the IDEA. GAO, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate (Sept. 2003) ("GAO Report") at 1. These 6.5 million students are "about 13 percent" of the total number of students nationwide, and they include "a wide variety of needs that range from mild to severe." *Id.* at 5. As the GAO explained:

> Children with speech or language impairments, specific learning disabilities, emotional disturbance, hearing impairments (including deafness), visual impairments (including blindness), orthopedic impairments, autism, traumatic brain injury, other health impairments, or mental retardation, and who need special education and related services are eligible under [the] IDEA.

Id.

The GAO also reported that, "[w]hile national data on disputes are limited and inexact," more than *3,000* due process hearings are held each year. *Id.* at 1. Equally important is this comment from the U.S. Department of Education about the significance of a hearing:

> Due process hearings are expensive for all parties, time-consuming, and are not undertaken lightly, so *due process hearings are universally understood to be a marker of serious unresolved differences* about a student's need for special education and related services or the nature or location of services.

Id. at 29 (reproducing letter from Assistant Secretary of Education, R.H. Pasternack, Ph.D.) (emphasis added). Consistent with this observation about costs – and consistent with Judge Luttig's concern for the "vast majority of parents" – the GAO reports a "significant relationship" between household income and hearing requests. GAO Report at 15 n.22. Not surprisingly, households with lower income are less likely than households with higher income to request a due process hearing. *Id.* Indeed, it is these less privileged families who figure most prominently among the "full mix of parents" whose difficulties in coping with the IDEA led Judge Luttig to conclude that the burden of proof should be placed on the school district. App. 20. Imposing the burden on parents adds yet another obstacle to these families seeking to vindicate their rights under the law.

It is, however, not just those who actually participate in hearings who are affected by the burden of proof. Many more hearings are requested than are actually held. *See* GAO Report at 13 (noting that 11,068 hearings were requested in 2000, but only 3,020 were held). Such a discrepancy suggests that many parents find the process too daunting and simply capitulate. The difficulties parents

encounter will be either exacerbated or ameliorated by the decision on where to place the burden. Indeed, the burden of proof can effect the outcome much earlier in the process. When parents and the school district sit down to negotiate the education program for a child, an awareness of who will bear the burden if no agreement can be reached can significantly affect the negotiation dynamics. Placing the burden on the parents significantly strengthens the hand of often-intransigent school district bureaucracies.

There is a manifest need for a uniform national rule on the burden of proof. Moreover, the rather extreme standard adopted by the Fourth Circuit – placing the burden on the parents *whenever* they challenge the school district – makes it especially appropriate that such a rule be established here. As a result of the decision below, school districts in five States will now be free to "ratchet down" services from previously-agreed levels, thereby confronting families with a dilemma: muster the costly resources necessary to mount a challenge or risk repeated cutbacks each year. Meanwhile, in two bordering circuits – the Third and the District of Columbia – the school district bears the burden, thereby creating an incentive for some families to relocate to obtain the services they need. A uniform rule is needed. Certiorari should be granted.

III. THIS PETITION PRESENTS AN IDEAL VEHICLE FOR DECIDING HOW TO ALLOCATE THE BURDEN OF PROOF.

Not only is the burden of proof an issue that should be resolved, this petition presents an ideal vehicle for resolving it. This is so for several reasons:

1. This petition comes at a time when the split is mature. Ten circuits have addressed the issue, and nothing would be gained by allowing it to percolate longer.

2. The case is not cluttered by collateral issues that could distract from the question presented or hinder its resolution. The burden of proof is the only issue addressed by the decision below.

3. By placing the burden of proof on the parents in all cases, the decision below stands in stark contrast with *Lascari*, which placed the burden on the school district in all cases. These "jurisprudential bookends" among the lower court decisions nicely highlight the issue for resolution by this Court.

4. Finally, unlike several circuit decisions – on both sides of the issue – the decision of the Fourth Circuit does not merely announce a result. It provides an explanation for its position. Moreover, it provides a well-reasoned dissent. Both the majority and dissenting opinions should assist the Court in reaching a careful resolution of the issue. For all of these reasons, certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

BRIAN SCHAFFER, a minor, by his parents and next friends, Jocelyn Schaeffer and Martin Schaeffer; JOCELYN SCHAFFER and MARTIN SCHAFFER

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November 19, 2004

APPENDIX

TABLE OF CONTENTS

Page

Decision of the court of appeals,
377 F.3d 449 (4th Cir. 2004) ..... App. 1

Dissenting opinion of Judge Luttig ..... App. 16

Decision of the district court,
240 F.Supp.2d 396 (D. Md. 2002) ..... App. 21

Decision of the court of appeals,
2 Fed. Appx. 232 (4th Cir. 2001) ..... App. 50

Decision of the district court,
86 F. Supp. 2d 538 (D. Md. 2000) ..... App. 54

Decision of the hearing officer
(Nov. 27, 2000) ..... App. 70

Decision of the hearing officer
(July 9, 1998) ..... App. 120

Order of district court
(Oct. 29, 2004) ..... App. 163

Denial of petition for rehearing and rehearing *en banc*
(Aug. 24, 2004) ..... App. 164

20 U.S.C.S. § 1400 (2004) ..... App. 166

20 U.S.C.S. § 1415 (2004) ..... App. 174

JERRY WEAST, Superintendent of Montgomery County Public Schools; BOARD OF EDUCATION OF MONTGOMERY COUNTY, Plaintiffs-Appellants, v. BRIAN SCHAFFER, a minor, by his parents and next friends, Jocelyn and Martin Schaffer; JOCELYN SCHAFFER; MARTIN SCHAFFER, Defendants-Appellees. NATIONAL SCHOOL BOARDS ASSOCIATION; MARYLAND ASSOCIATION OF BOARDS OF EDUCATION; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION; SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION; VIRGINIA SCHOOL BOARDS ASSOCIATION, Amici Curiae Supporting Appellant.

No. 03-1030

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

377 F.3d 449; 2004 U.S. App. LEXIS 15617

January 23, 2004, Argued
July 29, 2004, Decided

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Michael Jeffrey Eig, Chevy Chase, Maryland, for Appellees.

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JUDGES: Before WILKINSON, LUTTIG, and MICHAEL, Circuit Judges. Judge Michael wrote the opinion, in which Judge Wilkinson joined. Judge Luttig wrote a separate dissenting opinion.

OPINION BY: MICHAEL

OPINION: MICHAEL, Circuit Judge:

The Individuals with Disabilities Education Act (IDEA) gives every disabled child the right to a "free appropriate public education" tailored to meet his or her unique needs. 20 U.S.C. § 1400(d)(1)(A). To enforce this right, the IDEA requires every public school system receiving federal funds to develop and implement an Individualized Education Program (IEP) for each disabled child in its jurisdiction. *Id.* § 1412(a)(3)-(4). When the parents believe their disabled child's IEP is inadequate, they may initiate an administrative proceeding (called a due process hearing) to challenge the IEP. *Id.* § 1415(f). The parents of Brian Schaffer initiated a due process hearing to challenge the IEP developed for him by Maryland's Montgomery County Public School System (MCPS). The issue in this appeal is whether the district court was correct in assigning the burden of proof to the school system in that proceeding. The IDEA is silent on burden of proof. Because we have no valid reason to depart from the

general rule that the party initiating a proceeding has the burden of proof, we reverse and remand.

I.

Brian, who has Attention Deficit Hyperactivity Disorder and other learning disabilities, attended Green Acres private school in Montgomery County from pre-kindergarten through seventh grade. Green Acres does not have a special education program, and Brian struggled academically throughout his years in attendance there. Brian was placed on probation when he began the seventh grade in the fall of 1997; in October of that year school personnel told Brian's mother that he needed to attend a school that could more adequately accommodate his disabilities.

Shortly thereafter (in November 1997), Brian's mother contacted the Herbert Hoover Middle School, an MCPS school, and requested that Brian be evaluated to determine his eligibility for special education services for the 1998-1999 school year. In the meantime, Brian's parents applied to have him admitted to another private school, the McLean School of Maryland, for the 1998-1999 academic year. On February 26, 1998, the MCPS committee that determines special education eligibility, the Admission, Review, and Dismissal (ARD) Committee, held its first meeting to discuss Brian's educational needs with his parents, their lawyer, and Herbert Hoover school officials. The following month Brian was admitted to the McLean School for the next academic year, and his parents paid the enrollment fee to reserve his place in the eighth grade class. The ARD Committee held its second meeting in

early April 1998, found Brian eligible for special education, and offered an IEP for the next (1998-1999) school year.

The proposed IEP specified that Brian would receive 15.3 hours of special education and 45 minutes of speech therapy each week at his "home" school, Herbert Hoover Middle School. After the parents expressed concern about class size at Herbert Hoover, the MCPS offered to provide the same IEP services at the Robert Frost Middle School, a school ten minutes from Brian's home, where he could receive more of his instruction in smaller classes. Shortly thereafter, in May 1998, the parents informed MCPS that the proposed IEP was inadequate and that Brian would attend private school at McLean. At the same time, the parents requested a due process hearing pursuant to the IDEA, claiming that the proposed IEP denied Brian a free appropriate education; they sought reimbursement of the tuition and other expenses for Brian's private school attendance. (The IDEA requires the school system to arrange for an impartial due process hearing, and the hearing cannot be conducted by a system employee or an employee of the state educational agency. *See* 20 U.S.C. § 1414(f)(3). In Maryland the due process hearing is conducted by an administrative law judge (ALJ) in the state's Office of Administrative Hearings. *Md. Code Ann., Educ.* § 8-413(c) (Michie 1997); *A.B. v. Lawson,* 354 F.3d 315, 320 (4th Cir. 2004).)

At the original due process hearing in Brian's case, the ALJ assigned the burden of proof to the parents. The parents challenged the substance of the IEP, not the process by which it was developed, and the ALJ explained that deference is owed to education professionals in the substantive design of an IEP. The parents were therefore required to prove that the IEP was inadequate, specifically, that it

was not "reasonably calculated to enable the child to receive educational benefits." *Hendrick Hudson Bd. of Educ. v. Rowley,* 458 U.S. 176, 207, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982). Both sides submitted extensive expert testimony, and the ALJ considered the case to be close. He commented that the "assignment of the burden of proof [was] critical" to the outcome. J.A. 46. Ultimately, the ALJ concluded that the parents had not met their burden. The ALJ's order upheld the IEP proposed by the MCPS and denied the parents' request for reimbursement for Brian's private school expenses.

Brian's parents sued the MCPS (technically, the Board of Education of Montgomery County and its superintendent) in district court, claiming that the ALJ had erred in assigning the burden of proof to them. The district court, agreeing with the parents, reallocated the burden of proof to the MCPS and remanded the case to the ALJ for further proceedings. *Brian S. v. Vance (Schaffer I),* 86 F. Supp. 2d 538 (D. Md. 2000). The MCPS appealed the district court's *Schaffer I* order to our court, but before we heard argument the ALJ reconsidered the case pursuant to the district court's remand order. After reassigning the burden of proof to the MCPS, the ALJ found that the MCPS had failed to prove the adequacy of the IEP. The ALJ ordered the MCPS to make partial reimbursement to the parents for Brian's tuition and expenses at private school for the 1998-1999 year. The MCPS then filed an action (*Schaffer II*) in district court to challenge the ALJ's reassignment of the burden of proof. In the meantime, the MCPS's appeal from the district court's order in *Schaffer I* was still pending in this court. We disposed of that appeal by vacating the district court's order and "remanding to that court with directions that any issue with respect to the

proof scheme in this case be consolidated with the consideration of the merits." *Schaffer v. Vance*, 2 Fed. Appx. 232, 233 (4th Cir. 2001) (unpublished). Accordingly, in *Schaffer II* the district court, after reaffirming that the MCPS had the burden of proof, concluded that the ALJ had decided correctly on reconsideration that the proposed IEP was inadequate. The district court then set aside the ALJ's decision on tuition and expenses, awarding full reimbursement to the parents. *Weast v. Schaffer (Schaffer II)*, 240 F. Supp. 2d 396 (D. Md. 2002). The MCPS now appeals the district court's decision in *Schaffer II*.

II.

A.

The IDEA is silent about which side bears the burden of proof in a state administrative proceeding brought by parents to challenge the adequacy of an IEP. When a statute is silent, the burden of proof is normally allocated to the party initiating the proceeding and seeking relief. *See, e.g.*, J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999); *Dalton v. Capital Assoc. Indus. Inc.*, 257 F.3d 409, 416 (4th Cir. 2001); *Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 516 (4th Cir. 1991). Although "the natural tendency is to place the burden[] on the party desiring change" or seeking relief, other factors such as policy considerations, convenience, and fairness may allow for a different allocation of the burden of proof. *McCormick on Evidence* § 337.

Today our circuit must decide how to allocate the burden of proof in one of these IDEA-prescribed, state administrative proceedings initiated by parents to challenge an IEP. Other circuits are split – and splintered in

reasoning – on this question. Three circuits assign the burden to the parents, and four (perhaps five) assign it to the school system. The Sixth Circuit holds to "the traditional burden of proof" and requires the parents challenging an IEP to establish both its procedural and substantive deficiencies. *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990). The Fifth and Tenth Circuits also assign the burden of proof to the parents, but for a different reason. According to these circuits, because the statute relies on the expertise of education professionals in local school systems, their decisions about the substantive terms of an IEP are owed deference; as a result, the parents bear the burden of proving why an IEP is deficient. *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990).

On the other side the Third Circuit assigns the burden of proof to school systems when their IEPs are challenged by parents in administrative proceedings. *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995) (citing *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993) (holding that when an administrative decision upholding an IEP is challenged *in district court*, the school district has the burden of proof because of its expertise and access to information and witnesses)). Three other circuits, the Second, Eighth, and Ninth, have announced without explanation that the school system has the burden of proving the adequacy of the IEP at the administrative hearing. *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Independent Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994).

Finally, the D.C. Circuit assigned the burden of proof to a school system when an IEP was challenged as procedurally deficient, noting that "the underlying assumption of the Act is that to the extent its procedural mechanisms are faithfully employed, [disabled] children will be afforded an appropriate education." *McKenzie v. Smith*, 248 U.S. App. D.C. 387, 771 F.2d 1527, 1532 (D.C. Cir. 1985). It is not clear how the D.C. Circuit would assign the burden in a case such as this one where only the substance of the IEP is challenged.

Because the decisions assigning the burden of proof at the administrative hearing to the school system offer little or no analysis, they do not persuade us to depart from the normal rule of allocating the burden to the party seeking relief. We will therefore proceed to consider the main arguments advanced by Brian's parents for assigning the burden to the school system.

B.

The parents argue that because the IDEA is a remedial statute that places the obligation on a school system to provide a free appropriate public education for disabled children, the school system should bear the burden of proving that its IEP meets that obligation. This brings to mind other remedial federal statutes such as *Title VII of the Civil Rights Act of 1964*, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. These statutes impose on employers (or others) the obligation not to discriminate against an individual because of characteristics such as race, sex, disability, or age. Like the IDEA, these statutes are silent about burden of proof, yet we assign it to the plaintiff who seeks the statutory

protection or benefit; the burden is not assigned to the party with the statutory obligation. *See, e.g., Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 157 (3d Cir. 1995). We do not believe, then, that a school system should have the burden of proof in an IEP challenge just because it has the statutory obligation to propose an adequate educational program for the disabled child. A "favored group," in other words, is not relieved of the burden of proof "merely because a statute confers substantive rights on [it]." *Clyde K.*, 35 F.3d at 1399.

C.

Because school systems have a natural advantage in IEP disputes by reason of their greater expertise and resources, they should have the burden of proof, according to Brian's parents. Specifically, the argument goes, the school system understands the requirements of the IDEA, has greater educational expertise than parents, and has better access to information and witnesses. *See Oberti*, 995 F.2d at 1219. This persuaded the district court in Brian's case to assign the burden at the administrative level to the school system (the MCPS). *See Schaffer II*, 240 F. Supp. 2d at 403-04 (citing *Lascari v. Bd. of Educ.*, 116 N.J. 30, 560 A.2d 1180, 1186 (N.J. 1989)).

We do not automatically assign the burden of proof to the side with the bigger guns. And "very often [a party] must plead and prove matters as to which his adversary has superior access to the proof." *McCormick on Evidence* § 337. In IDEA administrative disputes Congress has taken steps, short of allocating the burden of proof to school systems, that level the playing field. As the Supreme Court observed, Congress recognized "that in any

[IDEA] disputes the school officials would have a natural advantage," so it therefore "incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *School Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985).

These procedural safeguards and other provisions in the IDEA are all designed to inform parents and to involve them in the development of the IEP for their child. The Act involves parents at all stages, making them members of their child's IEP team and enabling them to advocate for their position if a dispute arises. 20 U.S.C. § 1414(d). Parents have the right to examine all records, materials, assessments, and other information the school system uses to develop an IEP, and they have the right to participate fully in meetings relating to the IEP and the evaluation of their child. *Id.* § 1415(b). Parents have the right to request an independent evaluation of their child at school system expense. *Id.;* 34 C.F.R. § 300.502(b)(2)(ii). The school system must give parents written notice of their rights at key intervals: when their child is initially referred for evaluation, when they are notified about each IEP meeting, when their child is reevaluated, and when they register any complaint about the school system's effort to provide a free appropriate public education for their child. 20 U.S.C. § 1415(d)(1). The notice of the parents' rights must be written in "an easily understandable manner." *Id.* § 1415(d)(2). Finally, the statute authorizes "parent training and information centers," which, as the name suggests, are centers designed to "meet the training and information needs of parents of children with disabilities" and to "assist parents to understand the availability of,

and how to effectively use" the protections of the IDEA. *Id.* § 1482.

If the parents request an administrative hearing, additional services and protections become available. Voluntary mediation conducted by an impartial mediator, with the school system bearing the costs, must be made available before the case proceeds to hearing. 34 C.F.R. § 300.506. The school system must also advise the parents "of any free or low-cost legal and other relevant services available in the area." *Id.* § 300.507(a)(3). There are also discovery requirements that give parents advance notice of the evidence they will encounter at a hearing. A party may not introduce evidence that is not disclosed at least five business days before the hearing. *Id.* § 300.509(a)(3). Likewise, at least five business days prior to the hearing, "each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing." 20 U.S.C. § 1415(f)(2)(A). Finally, if the parents prevail in their challenge, they may be awarded reasonable legal fees. *Id.* § 1415(i)(3)(B).

The IDEA and its implementing regulations require an open process that makes relevant information and special services, such as the independent evaluation, available to parents. By the time the IEP is finally developed, parents have been provided with substantial information about their child's educational situation and prospects. They have continuing access to information and anticipated evidence once a hearing is requested. In sum, Congress has taken into account the natural advantage a school system might have in the IEP process, including the administrative hearing, by providing the explicit protections we have outlined. As a result, the school system has

no unfair information or resource advantage that compels us to reassign the burden of proof to the school system when the parents initiate the proceeding.

D.

Although Brian's parents recognize that the IDEA is silent as to burden of proof, they argue that "inherent in the [Act] is the principle that school systems bear the burden of proof." Appellees' Br. at 17. The parents refer to two cases, *Mills v. Board of Education of Washington, D. C.*, 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Association for Retarded Children v. Commonwealth (PARC)*, 343 F. Supp. 279 (E.D. Pa. 1972), that Congress apparently used as the blueprint for the *Education of the Handicapped Act*, now the IDEA. *See Rowley*, 458 U.S. at 194, ("The fact that both *PARC* and *Mills* are discussed at length in the Legislative Reports suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act.").

The Supreme Court in *Rowley* pointed out the similarities between *PARC* and *Mills* and what is now the IDEA. *Rowley*, 458 U.S. at 194 n. 16. *PARC*, like the Act, "required the State to identify, locate, and evaluate [disabled] children, to create for each child an individual educational program, and to hold a hearing on any change in education assignment." *Id.* at 194 n. 16, (internal quotation marks and citations omitted). *Mills*, for its part, provided parents with the various procedural safeguards that appear in the Act, such as their rights to inspect records, to have an independent evaluation of the child, "to object to the IEP and receive a hearing before an independent hearing officer, to be represented by counsel at

the hearing, and to have the right to confront and cross-examine adverse witnesses." *Id.* (citation omitted).

Mills placed the burden of proof at the administrative hearing on the school system. 348 F. Supp. at 881. In *PARC* after the school system satisfied its burden of production by introducing its placement report, the burden to introduce evidence shifted to the parents. It appears, however, that the ultimate burden of proof rested with the school system. *PARC*, 343 F. Supp. at 305. The parents argue that because the Act specifically incorporated a number of other major principles from *PARC* and *Mills*, "it stands to reason that Congress intended for the IDEA to echo their assignments of burden of proof." Appellees' Br. at 19. The circumstances compel the opposite conclusion, we believe. Congress took a number of the procedural safeguards from *PARC* and *Mills* and wrote them directly into the Act. Congress thus knows how to borrow ideas and incorporate them into legislation. For the Act here, it borrowed some ideas and specifically ignored others. We cannot conclude from this that Congress intended to adopt the ideas that it failed to write into the text of the statute. For whatever reason Congress did not assign the burden of proof, and Congress has not signaled by its silence that we should depart from the general rule.

E.

The dissent argues that in light of the affirmative (IDEA-mandated) obligation a school system has to provide an appropriate educational program for each disabled child, "the most reasonable, though by no means irrebuttable presumption, is that the school [system] should bear the burden of proof in the due process hearings." *Post* at

14. As we have already pointed out, however, the general rule is quite the opposite: a party who initiates a proceeding to obtain relief based on a statutory obligation bears the burden of proof. *McCormick on Evidence* § 337. The general rule is sometimes stated in a slightly different way that is instructive here: the burden of proof is on the party who should lose if no evidence is offered by either side. 9 J. Wigmore, *Wigmore on Evidence* § 2485 (1981). We believe that when parents challenge the adequacy of an IEP, they should lose if no evidence is presented. To say that the school system should lose is to say that every challenged IEP is presumptively inadequate. *See id.* A presumption of inadequacy would go against a basic policy of the IDEA, which is to rely upon the professional expertise of local educators. Congress enacted the IDEA with the clear intention of deferring to local school authorities for the development of educational plans for disabled children. *See Rowley,* 458 U.S. at 207-08; *Hartmann by Hartmann v. Loudoun County Bd. of Educ.,* 118 F.3d 996, 1000-01 (4th Cir. 1997). And while Congress "entrusts a [disabled] child's education to state and local agencies" under the IDEA, it "protects individual children by providing for parental involvement [and for certain assistance to parents] . . . in the formulation of [a] child's [IEP]." *Rowley,* 458 U.S. at 208. Under this statutory arrangement, it is reasonable to require parents attacking the terms of an IEP to bear the burden of showing why it is deficient.

The dissent would assign the burden of proof to the school system because of its "distinct, inherent advantage" over parents when it comes to proposing and evaluating educational plans for disabled children. *Post* at 14. Parents, the dissent says, "lack the comprehensive understanding . . . (and] means to assess the likely benefit of

available alternatives." *Id.* Again, when Congress designed and passed the IDEA, it was keenly aware that school systems have professional expertise and that parents do not. It was for this very reason that Congress imposed statutory safeguards to assist parents in becoming substantively informed. If Congress considered burden of proof at all, it no doubt recognized that allocating the burden to school systems is not the kind of help parents really need in challenging IEPs. For regardless of which side has the burden of proof in an administrative hearing, parents will have to offer expert testimony to show that the proposed IEP is inadequate. Shifting the burden of proof, in other words, will not enable parents by themselves to mount a serious, substantive challenge to an IEP. Congress recognized that parents need professional assistance, and the IDEA therefore allows parents who prevail in due process hearings to recover their fees for hiring lawyers. 20 U.S.C. § 1415(i)(3). If experience shows that parents do not have sufficient access to substantive expertise under the current statutory scheme, Congress should be called upon to take further remedial steps. As far as procedure is concerned, however, we have no convincing reason to depart from the traditional burden of proof in IDEA due process hearings.

III.

In sum, the IDEA does not allocate the burden of proof, and we see no reason to depart from the general rule that a party initiating a proceeding bears that burden. Congress was aware that school systems might have an advantage in administrative proceedings brought by parents to challenge IEPs. To avoid this problem, Congress provided a number of procedural safeguards for parents,

but assignment of the burden of proof to school systems was not one of them. Because Congress took care in specifying specific procedural protections necessary to implement the policy goals of the Act, we decline to go further, at least insofar as the burden of proof is concerned. Accordingly, we hold that parents who challenge an IEP have the burden of proof in the administrative hearing. We reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

DISSENT BY: LUTTIG

DISSENT BY: LUTTIG, Circuit Judge, dissenting:

I do not agree with the majority's holding that the burden of proof in due process hearings conducted pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(f)-(g), should be borne by a disabled child's parents, rather than by the school district that is charged with providing that child a "free appropriate public education," 20 U.S.C. § 1412(a)(1)(A). Not only does the school district have the affirmative, statutory obligation under the IDEA to develop a suitable education program (IEP) for every disabled child, the school district is also in a far better position to demonstrate that it has fulfilled this obligation than the disabled student's parents are in to show that the school district has failed to do so. Accordingly, I would hold that the school district – and not the comparatively uninformed parents of the disabled child – must bear the burden of proving that the disabled child has been provided with the statutorily required appropriate educational resources.

The majority concludes otherwise based on the "normal rule of allocating the burden to the party seeking relief." *Ante* at 6-7. As even it admits, however, this so-called "rule" is, in actuality, merely a presumption and not a very strong one at that. Relying on *McCormick on Evidence,* the majority explains that, "although 'the natural tendency is to place the burden[] on the party desiring change' or seeking relief, other factors such as policy considerations, convenience, and fairness may allow for different allocation of the burden of proof." *Ante* at 5 (quoting *McCormick on Evidence* § 337).

Each of these "other factors" – policy, convenience and fairness – weigh against the assignment of the burden of proof to the parents in this case. To begin with, the policies behind the IDEA indisputably argue in favor of placing the burden of proof with the school district. As the Supreme Court has explained,

> the Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"

Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 179, 73 L. Ed. 2d 690 102 S. Ct. 3034 (1982) (brackets in original). In the service of this effort, the IDEA obligates school districts to provide every disabled child with an educational program that is reasonably responsive to that child's disability. *Id.* at 188-89. The IDEA also requires school districts to involve the parents of the disabled child in the formulation of educational plans made

in response to the child's particular disability and to receive and consider the suggestions of parents in the development of those plans. In light of these affirmative obligations, the most reasonable, though by no means irrebuttable, presumption is that the school district should bear the burden of proof in the due process hearings required by the Act as well.

The majority suggests otherwise by comparing the obligation of school districts under the IDEA to that of defendants in civil rights claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination Act. *See ante* at 7. Because defendants in civil rights claims have a statutory obligation to refrain from discrimination but do not bear the burden of proof in claims against them, the majority reasons that the school districts' obligation under IDEA should not compel it to bear the burden of proof either. *Ante* at 7. The analogy is not apt. Unlike the civil rights statutes referenced by the majority, the IDEA does not merely seek to *remedy* discrimination against disabled students, it imposes an *affirmative obligation* on the nation's school systems to provide disabled students with an enhanced level of attention and services. *See Rowley,* 458 U.S. at 189 (explaining that "the face of the statute evinces a congressional intent . . . to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each [disabled] child") (emphasis in original). And it is this affirmative obligation (rather than the Act's purpose of remedying discrimination) that weighs most heavily in favor of placing the burden of proof in due process hearings on the school district.

Turning next to the interests of convenience and fairness, it is apparent that the school district possesses a distinct, inherent advantage over the parents of disabled children in assessing the feasibility and the likely benefit of alternative educational arrangements. While individual parents may have insight into the educational development of their own children, they lack the comprehensive understanding of the educational alternatives available to disabled children in the school district that officials of the school system possess. And, even more importantly, the parents lack the means to assess the likely benefit of available alternatives. Parents simply do not have, and cannot easily acquire, the cumulative, institutional knowledge gained by representatives of the school district from their experiences with other, similarly-disabled children.

The majority recites, at length, the services and protections provided to parents under the IDEA, but the mere recitation of these provisions does nothing more than highlight Congress' awareness that parents of disabled children operate at a disadvantage when they seek to contest the individualized educational placement developed by their school district. It certainly does not show that Congress has "leveled the playing field" between the school district and the parents. These procedural protections may invest parents with a basis to understand the characteristics of their child's disability and may even provide some understanding of the relative benefits and drawbacks of the educational plan proposed by the school district. But, even in the rosiest of scenarios, the provision of such remedial protections and services would not begin to impart to the average parent the level of expertise or knowledge that the school district possesses as a matter of course.

The majority may well be correct that the assignment of the burden of proof to the party with the "bigger guns"

is not "automatic." However, with only a faint, general presumption in favor of placing the burden of proof on the complainant on the other side of the equation, the fact that the party with the "bigger guns" also has better access to information, greater expertise, and an affirmative obligation to provide the contested services can hardly be ignored. Indeed, in my judgment, the collective weight of each of these considerations is dispositive.

I fear that, in reaching the contrary conclusion, the majority has been unduly influenced by the fact that the parents of the disabled student *in this case* have proven to be knowledgeable about the educational resources available to their son and sophisticated (if yet unsuccessful) in their pursuit of these resources. If so, it is regrettable. These parents are not typical, and any choice regarding the burden of proof should not be made in the belief that they are. For the vast majority of parents whose children require the benefits and protections provided in the IDEA, the specialized language and technical educational analysis with which they must familiarize themselves as a consequence of their child's disability will likely be obscure, if not bewildering. By the same token, most of these parents will find the educational program proposed by the school district resistant to challenge: the school district will have better information about the resources available to it, as well as the benefit of its experience with other disabled children. With the full mix of parents in mind, I believe that the proper course is to assign the burden of proof in due process hearings to the school district.

I respectfully dissent.

JERRY D. WEAST,[1] et al. Plaintiffs v. BRIAN SCHAFFER, et al. Defendants

Case No. PJM 99-15, (Docket # 61)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION

240 F. Supp. 2d 396; 2002 U.S. Dist. LEXIS 25323

November 21, 2002, Decided
November 25, 2002, Opinion Filed

COUNSEL: For Plaintiff(s): Zvi Greismann, Esquire, Rockville, Maryland.

For Plaintiff(s): Jeffrey A. Krew, Esquire, Columbia, Maryland.

For Defendant(s): Michael J. Eig, Esquire, Haylie Michelle Iseman, Esquire, Chevy, Chase, Maryland.

JUDGES: PETER J. MESSITTE, UNITED STATES DISTRICT JUDGE.

OPINION BY: PETER J. MESSITTE

OPINION:

I.

The parents of Brian Schaffer, a child with a disability as defined in the Individuals With Disabilities Education Act (IDEA), 20 U.S. § 1400, *et seq.*, disagreed with the Montgomery County, Maryland, Public School system (MCPS) that it offered Brian a Free Appropriate Public

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[1] Plaintiff Weast is the Superintendent of the Montgomery County, Maryland Public School System (MCPS). Plaintiffs will be referred to collectively hereinafter as "MCPS."

Education (FAPE) for the school year 1998-99. As a result, the parents unilaterally placed Brian in private school for that year and sought reimbursement pursuant to the Act. With the case before him for a second time, the Administrative Law Judge (ALJ) held that MCPS had not provided Brian a FAPE,[2] but awarded the parents reimbursement

[2] The first time this case was before him (*Schaffer I*), the ALJ denied the parents reimbursement. Finding that assignment of the burden of proof in the case was "critical" to his decision and assigning that burden to the parents, he concluded that they had failed to demonstrate that the Individualized Educational Plan (IEP) devised for Brian was not reasonably calculated to provide educational benefit or that the placement offered by MCPS was not appropriate to provide for the child's education in accordance with the IDEA.

Brian's parents appealed the decision to this Court, which granted their motion for summary judgment and issued an opinion reallocating the burden of proof to MCPS. *See Brian S. v. Vance*, 86 F. Supp. 2d 538 (D. Md. 2000). Based on that reallocation of the burden of proof, the case was remanded to the ALJ for further proceedings. Notwithstanding the apparent interlocutory nature of the Court's decision, MCPS took an appeal to the Fourth Circuit. While that appeal was pending, the ALJ considered the case anew and applied this Court's revised burden of proof scheme. Revisiting his earlier decision, the ALJ reversed himself and concluded that the proposed IEP would not have provided Brian with a FAPE for 1998-99. However, the ALJ also concluded that, while Brian's parents were entitled to reimbursement for the private placement, since they never seriously contemplated placing him in public school, they should receive only no more than one-half of the tuition paid for Brian's private education for the indicated school year.

The Fourth Circuit, viewing the case in that posture, ruled:

> In light of this development, we vacate the decision of the district court and remand to that court with directions that any issue with respect to the proof scheme in this case be consolidated with the consideration on the merits. At this stage, it remains unclear what role, if any, the allocation of the burden of proof will have on the final adjudication of Brian's claim. Moreover, there may well be cross-appeals of the ALJ's decision since neither party prevailed fully at the hearing stage. If this court is to address the issue of who has

(Continued on following page)

for only one-half the year's tuition (*Schaffer II*). The parents have appealed the latter decision. They also ask, by way of a motion for preliminary injunction, that MCPS be required to fund Brian's placement at private school for the school years 1999-00 and 2000-01. MCPS has appealed the decision of the ALJ to the extent that he awarded the parents any reimbursement at all.

The parties have filed Cross-Motions for Summary Judgment.[3]

The Court will GRANT the parents' Motion for Summary Judgment and will AFFIRM the finding of the ALJ that MCPS did not provide Brian with a FAPE for 1998-99.

> the burden of proof in challenging an initial IEP, it should be in the context of a matured case or controversy rather than in the piecemeal fashion in which this case now appears before us. Accordingly, the judgment of the district court is vacated and remanded for further proceedings consistent with this opinion.

Schaffer v. Vance, 2 Fed. Appx. 232 (4th Cir.2001) 2001 WL 22920.

The ALJ has now rendered his decision on remand (*Schaffer II*) and the parties have cross-appealed that decision. As the Court will discuss presently, the issue of which side bears the burden of proof was once again critical to the ALJ's decision.

[3] Summary judgment is appropriate where there is no genuine issue of material fact. Fed. R. Civ. P. 56. The parties apparently agree that such is the case here, the only issue being what conclusions should be drawn from undisputed facts. On the other hand, the Court is also the trier of fact in an appeal from an administrative decision in an IDEA case. Accordingly, the Court can also (and indeed will) judge this appeal as the trier of fact, especially where – as here – the parties have added no evidence to the record beyond what the ALJ had before him. *Cf. Marathon Mfg. Co. v. Enerlite Prod. Corp.*, 767 F.2d 214, 217 (5th Cir. 1985) (holding that where the parties stipulate that the court may make findings of fact on the basis of the record at the summary judgment hearing, the court may determine the facts rather than merely whether factual issues exist).

It will REVERSE the ALJ's decision insofar as he ordered reimbursement for only one-half of the school year and will DIRECT that the parents be reimbursed for the entire 1998-99 school year. The parents' Motion for Preliminary Injunction, asking that they be reimbursed for the school years 1999-00 and 2000-01, will be DENIED.

The Cross-Motion of MCPS for Summary Judgment will be DENIED.

II.

A) *Schaffer I*

Brian, who was 14 years old in 1998-99, is learning-disabled, language-impaired and other health impaired. He has been diagnosed as having attention deficit hyperactivity disorder and needs special education and related services to benefit from school attendance. From kindergarten through seventh grade, he attended Green Acres School, a private school in Montgomery County where, despite small class size and significant accommodations as well as parentally provided extra services, he did not succeed.

In November 1997, Brian's mother contacted MCPS and requested special education services for him for the 1998-99 school year, submitting outside evaluations in support of her request. After reviewing the outside evaluations and conducting additional tests, MCPS found Brian eligible for special education and proposed a part-time placement at Hoover Middle School, with an alternative placement at the Robert Frost Middle School. This was Brian's initial IEP.

Because they believed the IEP drafted for Brian was not reasonably calculated to provide him with appropriate educational benefit, his parents notified MCPS that they rejected the proposed placement. In May of 1998, they requested an administrative due process hearing. More or less simultaneously, anticipating the beginning of a new school year in the fall, they enrolled him for the 1998-99 school year at the McLean School, a private school for learning and language-disabled students located in Montgomery County.

In *Schaffer I,* in which the ALJ assigned the burden of proof to the parents, the ALJ considered the evidence relative to the "central auditory processing problem" he found Brian had. He cited the testimony of Drs. Ruth D. Spodak and Carol A. Kamara, Brian's experts on learning disabilities and speech/language pathology respectively, both of whom stated that the IEP proposed for Brian failed to offer an appropriate educational benefit because he required small, self-contained special education classes of a kind not included in the IEP. Dr. Spodak testified that such classes were essential to Brian's education because they would tend to minimize the distractions interfering with his ability to learn. Dr. Kamara testified that his "central auditory processing" problem increased his susceptibility to distractions, necessitating a small, self-contained learning environment.

The ALJ noted that Dr. Spodak's testimony differed in some respects from a report she and members of her staff had written earlier about Brian's learning disabilities. This, along with the fact that she herself had spent only ten minutes with Brian, caused the ALJ to "question[] the probative value of Dr. Spodak's opinion." Similarly, the ALJ noted that Dr. Kamara's opinion was compromised to

some extent by her acknowledgment of the diagnostic limitations of the test she relied upon in diagnosing Brian's "central auditory processing" problem and by her refusal to offer an opinion as to whether Brian's speech-language disability was mild, moderate, or severe. Finally, the ALJ noted that two experts from MCPS, Dr. Barbara J. Butera, a school psychologist, and Pamala Zahara, a speech pathologist, testified that the IEP was appropriate to Brian's needs and that, in their view, Brian suffered not from a "central auditory processing" problem but from a mild speech-language disability.

The ALJ deemed assignment of the burden of proof in the case to be "critical":

> There are experts on both sides in this case who have testified with opposing points of view. The credentials of all of those experts, in their respective fields, were impressive. Because each side's experts have diverging views on the question of what the Child's needs were and which placement would afford the requisite educational benefit for the Child, an assignment of the burden of proof in this case becomes critical.

Placing the burden of proof upon the parents, the ALJ decided that they had not demonstrated that Brian failed to receive a FAPE:

> The Parents have failed to persuade the ALJ that the April 6, 1998 IEP was not reasonably calculated to provide educational benefit, or that the placement(s) offered by MCPS are not appropriate to provide for the Child's educational needs in accordance with the IDEA.

Accordingly, the parents' request for reimbursement was denied.

B) *Schaffer II*

In *Schaffer II,* with the burden of proof shifted to MCPS, but without additional evidence being presented, the ALJ revisited the record. Again he found that the core dispute was whether Brian had a "central auditory processing" problem and again he considered the impact, if any, that that disability had on Brian's ability to learn. The ALJ reviewed the testimony of Dr. Kamara, the Schaffers' speech/language pathology and audiology expert, who was critical of the proposed placement of Brian at Herbert Hoover Middle School or the Robert Frost Middle School "because of the risk of simultaneous messages, distractions and possible distortions of audio signals in that setting." He looked again at Dr. Kamara's opinion that the critical need of the child – his "central auditory processing" problem – had not been addressed in the 1998-99 IEP. The ALJ also considered the testimony of the speech/language pathologist for MCPS, Pamala Zahara, who opined that Brian did not exhibit evidence of "severe auditory processing difficulties related to discrimination at the word level." The ALJ weighed Dr. Kamara's qualifications as a certified audiologist against those of Ms. Zahara as a speech/language pathologist. The fact that Dr. Kamara had conducted a formal comprehensive evaluation of Brian that took four hours to complete as opposed to the informal assessment Ms. Zahara took approximately one hour to make was also taken into account. At the end of the day, the ALJ concluded that "undoubtedly, Dr. Kamara's effort and experience in evaluating the Child was more extensive than that of Pamala Zahara."

Even then, however, the ALJ found that the evidence remained in balance:

In sum, the weight of the evidence from Dr. Kamara and Pamala Zahara on the usefulness of the SCAN-A and the existence of the Child's unique "central auditory processing" problem, rests in equipose. In resolving the dispute of fact, the ALJ must accept one expert's opinion and reject the other. Unlike the initial hearing, MCPS now bears the burden of proof on facts in dispute. For this reason, the ALJ now accepts the opinion from Dr. Kamara that the Child has an unique "central auditory processing" problem and rejects Pamala Zahara's opinion to the contrary. Having reversed the factual finding on that initial point, the ALJ will further accept, the opinion of Dr. Kamara that the Child's unique "central auditory processing" problem has a significant impact on his learning and rejects expert opinion testimony from MCPS to the contrary.

The ALJ also revisited the testimony of Dr. Spodak, Brian's expert witness in psychology and learning disabilities:

> During her testimony, she opined, consistent with the opinion of Dr. Kamara, that the Child would receive only trivial or minimal educational benefit, not the appropriate benefit, in a placement at either the Herbert Hoover Middle School or the Robert Frost Middle School. Dr. Spodak would not recommend that the Child be provided special education services in an "inclusion model" setting.[4] Dr. Spodak believes that the Child's

[4] Under the "inclusion model" at Herbert Hoover, Brian would have been in a class of between 24-28 students. Those classes would be co-taught by a certified special education teacher and another teacher (not certified as a special education teacher). The certified special education teacher would focus on and provide special education services to 5-6

(Continued on following page)

> educational needs can only be met in small, self-contained special education classes. Small, self-contained special education classes in all academic settings are needed to minimize distractions in order for the Child to be available for learning.

The ALJ gave the MCPS experts their due, but found their opinions wanting:

> MCPS special education experts testified that many of the disabled students in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School have a "profile" similar to the Child's abilities, disabilities and educational needs. MCPS special education experts testified those students with a "similar profile" are successful learning in that setting. This testimony estimates the Child's projected learning in the "inclusion model" setting compared with a group of students with whom the experts are familiar on the basis that the Child has a "similar profile." This may be a valid comparison if the Child's needs are correctly identified and properly considered in such "profiling."
>
> However, MCPS experts do not recognize that the Child has an unique central auditory processing problem that has a significant impact on his learning as described by Dr. Kamara. Resultantly, the ALJ is left to question how similar a profile the Child has to those students who are successful at the Herbert Hoover Middle School or the Robert Frost Middle School. The failure of

students in the class who had IEPs. Brian would have been one of those 5-6 students.

MCPS experts to accept and take this need of the Child into their consideration is a factor in evaluating the merit of their opinions.

Dr. Kamara testified that the April 6, 1998 IEP, as drafted, does not recognize the Child's central auditory processing problem as a need to be addressed in the Child's education. The April 6, 1998 IEP had no goals to address the Child's severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem, as found and described by Dr. Kamara. This testimony was not refuted. Having accepted the position that the Child has an unique central auditory processing deficit, the failure of the IEP to recognize and address that deficit is noteworthy.

And, finally, the ALJ reaffirmed the essential equivalence of the evidence:

> In sum, the weight of the evidence from the Parents' experts and the experts on behalf of MCPS on the degree of "educational benefit" that the Child could have obtained under the April 6, 1998 IEP, in the "inclusion" setting at either the Herbert Hoover Middle School or the Robert Frost Middle School, rests in equipose [sic]. In resolving this dispute, the ALJ must accept the opinion from one side's experts and reject the other. Unlike the initial hearing, MCPS now bears the burden of proof on facts in dispute. For this reason, the ALJ now accepts the opinions from Dr. Kamara and Dr. Spodak that the Child – given his potential for learning – would not have obtained meaningful educational benefit under the April 6, 1998 IEP in a placement at either the Herbert Hoover Middle School or the Robert Frost Middle School.
>
> Given the findings of fact, herein, MCPS has failed to persuade the ALJ that the April 6, 1998 IEP was reasonably calculated to provide "significant learning" and "meaning educational benefit" and the placement(s) offered by MCPS were appropriate to provide for the Child's educational needs in accordance with the IDEA.

Notwithstanding this conclusion, full reimbursement for Brian's private schooling for school year 1998-99, was denied. Noting that reimbursement is an equitable form of relief, the ALJ concluded on the basis of the evidence that there was "a design by the parents to simply obtain funding from MCPS for a predetermined decision to have the Child attend private school . . . The parents did not approach their interaction with MCPS as a partnership in educating the child as a student with disabilities." Accordingly, "as a matter of equity," the ALJ decided to create a "partnership between the parents and MCPS for funding the placement of the Child at the McLean School of Maryland for the 1998-1999 school year." In other words, he directed the school authorities to pay one-half the tuition's costs for the year, the parents would be obliged to assume the other half.

III.

Interestingly, in its appeal from the ALJ's decision in *Schaffer II,* MCPS does not challenge the Court's earlier decision to allocate the burden of proof to MCPS. Instead it argues that the ALJ misapplied that burden of proof by materially altering his findings of fact and by making new findings as to the credibility of witnesses where no new

evidence was introduced and where the original evidence in favor of MCPS remained "overwhelming." However, despite the failure of MCPS to raise the issue, since the Fourth Circuit vacated the Court's earlier decision regarding the allocation of burden of proof and since the allocation of the burden was as critical to the disposition of *Schaffer II* as it was to *Schaffer I,* the Court must necessarily address the issue again. Only then can the Court determine whether or not the ALJ misapplied that burden, as argued by MCPS.

Brian's parents, while denying that they "predetermined" that Brian would attend private school come what may, insist that their intention is in any event irrelevant. So long, they say, as they cooperated in good faith in the development of an IEP, they are entitled to full reimbursement if Brian was not offered a FAPE, even if they were fixed on private schooling for him all along.

IV.

The Court accepts the ALJ's conclusion in *Schaffer II* that allocation of the burden of proof is critical to the adjudication of Brian's claim. Accordingly the Court reaffirms its earlier decision that, with regard to an initial IEP, the burden of proof in the administrative due process hearing that might follow is upon the school district, not upon the parents. The Court embraces the same analysis as before. Thus –

A challenge to an IEP may arise in different settings:

1) The first involves an initial IEP, proposed by the school authorities the first time it is sought for a child, one

which the parents disagree with and as to which they seek a administrative due process hearing (the present case);

2) Next is the existing IEP, which at one time was agreed to by everyone, but which either the parents or the school district seeks to change against the wishes of the other, whereupon the matter goes to a due process hearing; and

3) Finally, there is the IEP that has been passed upon by an independent ALJ, which a party seeks to challenge in a court proceeding.[5]

The cases, when considering which side has the burden of proof, do not always distinguish among these settings, but in fact there appears to be reason to do so.

In the last scenario, the law and policy considerations are the most sharply defined. The Fourth Circuit has clearly held that the burden of proof on appeal from an administrative decision is upon the party challenging the decision. *See Barnett v. Fairfax County Sch. Bd.,* 927 F.2d 146, 152 (4th Cir. 1991); *Tice v. Botetourt County Sch. Bd.,* 908 F.2d 1200, 1206 n.5 (4th Cir. 1990); *Spielberg v. Henrico County Pub. Sch.,* 853 F.2d 256, 258 n.2 (4th Cir. 1988). This, according to the Fourth Circuit, arises out of deference to the underlying state administrative process. *Tice,* 908 F.2d at 1206 n.5. That in turn undoubtedly flows from the general belief that, once an impartial judicial hearing has been held and a decision made – even at the

[5] There is at least one further scenario, in which both the parents and the school district seek to change an existing plan. Discussion of which party has the burden of proof in that setting is best left for another day.

administrative level – the burden of overturning the decision ought to be upon the party challenging it.[6]

Moving to the intermediate scenario, where an existing IEP is sought to be changed, if for no other reason than that it seems "fair[]," *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), it is not unreasonable to conclude that the burden of persuasion as to the change should be borne by the party seeking the change. Numerous cases so hold. *See, e.g., Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir. 1995); *Doe v. Bd. of Educ.*, 9 F.3d 455, 458 (6th Cir. 1993); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights Ind. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 919 (1st Cir. 1983); *Tatro*, 703 F.2d at 830.[7]

These authorities are in accord with the observation made by Professor Wigmore that the burden of proof is frequently placed "upon the party to whose case the fact is essential," 9 Wigmore on Evidence, § 2486 at 288 (italics

[6] But not all circuits agree that assignment of the burden should be thus. In *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995), for instance, the Third Circuit held that the burden should always be upon the school district. *See also Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993).

[7] It is not always clear from the language of these cases whether they are addressing the burden of proof at the administrative level, in the district court, or both. The cases are often cited, however, as standing for the proposition that the party seeking to change an existing IEP bears the burden of proof at the administrative level. *See, e.g., T.H. v. Bd. of Educ.*, 55 F. Supp. 2d 830, 835 n.5 (N.D. Ill. 1999); *Schmerling v. Anne Arundel County Bd. of Educ.*, Civ. No. WMN 98-2283 slip op. at 5 (D. Md. May 19, 1999); *Manchester Sch. Dist. v. Charles M.F.*, 1994 U.S. Dist. LEXIS 12919 No. CIV. 92-609-M, 1994 WL 485754, at *4 (D. N.H. Aug. 31, 1994).

omitted). In the context of an IDEA case, this argues for the proposition that the party seeking a change in the IEP should have to explain why the change is appropriate.

Despite this, a number of cases have held that the burden of proof at the administrative level should always lie with the school district, even when the parents are seeking to change an existing IEP. *See Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994); *see also Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Indep. Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995); *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1034-35 (3d Cir. 1993); *Lascari v. Bd. of Educ.*, 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989).

The reasoning of these holdings varies from none at all, i.e. from mere assertion, to a brief reference to the statutory obligation to accommodate disabled children, to, in a very few cases, a rather elaborate explanation. Among the cases that merely assert that the burden is upon the school district are *Clyde K.*, 35 F.3d at 1398, and *Walczak*, 142 F.3d at 122. In the middle category is *Wall v. Mattituck-Cutchogue Sch. Dist.*, 945 F. Supp. 501 (E.D.N.Y. 1996), to wit:

> It has consistently been held that the burden throughout the administrative process is placed upon the school district. This is in obvious recognition of the school's overarching obligation to attend to the specific educational needs of children with disabilities. *See* S. Rep. No. 94-168 to P.L. 94-142, at 9, reprinted in 1975 U.S.C.C.A.N. 1425, 1433 ("It is this Committee's belief that the Congress must take a more active role under its

> responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity.").

945 F. Supp. at 511 (citations omitted).

Undoubtedly the most elaborate rationale was set forth in *Lascari*, which bears quoting in extenso:

> We believe it is more consistent with the State and federal scheme to place the burden on the school district not only when it seeks to change the IEP, but also when the parents seek the change.
>
> Various considerations lead us to that conclusion. Underlying the State and federal regulations is an abiding concern for the welfare of handicapped children and their parents. Consistent with that concern, the basic obligation to provide a handicapped child with a free, appropriate education is placed on the local school district. It is the district that must identify handicapped children and then formulate and implement their IEPs. Finally, the regulatory scheme vests handicapped children and their parents with numerous procedural safeguards. Those safeguards include the right to counsel and to the advice of experts, 20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.508(a)(1); to present evidence and cross-examine witnesses, 20 U.S.C. § 1415(d)(2); 34 C.F.R. § 300.508(a)(2); to "have the child who is the subject of the hearing present," id. at § 300.508(b)(1); and to a public hearing, id. at § 300.508(b)(2). Like those procedural safeguards, the allocation of the burden of proof protects the rights of handicapped children to an appropriate education.

> Our result is also consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens. In the past, we have placed either the burden of production, see *Ryan v. Mayor & Council of Demarest*, 64 N.J. 593, 604-05, 319 A.2d 442 (1966), or the burden of proof on the party with the better access to relevant information, *Andersen v. Exxon Co.*, 89 N.J. 483, 500, 446 A.2d 486 (1982); *Brundage v. New Jersey Zinc Co.*, 48 N.J. 450, 475-77, 226 A.2d 585 (1967). The school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP. Through the child study team, the board generally has extensive records pertaining to a handicapped child. The board is also conversant with the federal and State laws dictating what the district must provide to handicapped children in order to comply with the EAHCA. *Cf. S-1 v. Turlington*, 635 F.2d 342, 348-49 (5th Cir.) (burden on district to raise question whether student's misconduct is based on handicap because parents lack wherewithal to know rights under EAHCA), cert. denied, 454 U.S. 1030, 102 S. Ct. 566, 70 L. Ed. 2d 473 (1981), abrogated on other grounds by *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.

116 N.J. at 44-45; 560 A.2d at 1188.[8]

[8] This Court would add a further observation: The Congressional statements and declarations that appear at the beginning of the IDEA refer to minority children, *see, e.g.* 20 U.S.C. § 1400(c)(7) to (10), in particular economically disadvantaged minorities. *Id.* at § 1400(b)(8)(C).

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As to the first scenario – that in which an initial IEP is disputed at a due process hearing – all of *Lascari's* considerations came into play but there is more. In the initial situation, unlike the change situation, the parents have never agreed that the IEP is appropriate. By definition, they have disagreed and sought a determination by an impartial hearing officer, one, it may be noted, who by law may not be associated with the school authority. 20 U.S.C. § 1415(f)(3). In this circumstance, the only sense in which "change" is involved is that the parents wish to change what the school authorities have unilaterally proposed. Since the IEP is supposed to be a joint enterprise, if parents have never agreed to it, it is debatable whether an IEP can even be said to exist. The situation seems much like that in which two parties engage in a dispute, following which litigation is initiated. If one assumes, following Wigmore, that "the party having in form the affirmative allegation" should carry the burden of proof, 9 Wigmore on Evidence, § 2486 at 288 (italics omitted), it would seem entirely reasonable to assign the burden to the school authority to affirmatively establish the propriety of the plan it proposes.[9]

Strictly speaking, if parents in those categories have the burden of persuasion at the administrative level, their failure to put on a prima facie case would mean that the school district could rest without having to produce any evidence in justification of the IEP. On the other hand, parents who can afford to retain counsel and experts, while still having the burden of persuasion, could at least force the school district to produce evidence in support of the IEP. Query, whether such a result is fair, apart from whether Congress could have intended it.

[9] Of course the same argument could be made in support of assigning the burden to the school board at any level – that it should always be required to demonstrate the propriety of the plan that it

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As one commentator has pointed out, allocating the burden of proof to the school authority in no way reflects a lack of deference to the expertise of the school authorities. But there may be, she writes, a tendency to "confuse the *Rowley* Court's deference to school officials on methodological matters with matters of burden of proof." Dixie Snow Huefner, Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?, 14 Harv. J.L. & Pub. Pol'y 483, 512 (1991). To acknowledge the expertise of school officials is not the same as saying that they should not have to demonstrate to an impartial fact-finder, at least in connection with an initial IEP, that the proposed goals and objectives of the IEP address the student's needs, that the proposed IEP will deliver services to those needs in a way that will provide progress towards those goals and objectives, or that criteria are in place to evaluate the child's progress which can actually measure the extent to which the objectives are obtained. *Id.*

Finally, Wigmore offers this perspective on the burden of proof issue:

> There is . . . no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific

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proposes. That, in fact, appears to be the rationale of those cases that have assigned the burden to the school board at all levels.

> classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness.

9 Wigmore on Evidence, § 2487 at 292 (footnotes omitted).[10]

To the extent that the Court writes on a clean slate, therefore, it holds that with regard to an initial IEP, experience and fairness dictate that the school district should have the burden of proof at any administrative due process hearing that might follow. In contrast, not only experience and fairness but clear case law indicate that, when a change is sought in an existing IEP, the party seeking the change should have the burden of proof.

Because the case at bar involved the parents' disagreement with a proposed initial IEP, the Court finds the ALJ correctly assigned the burden of proof to MCPS.

V.

As MCPS points out, "federal courts must accord due weight to state administrative proceedings which are entitled to be considered *prima facie* correct." *See Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). But what MCPS asks is that the Court defer to the ALJ's findings in *Schaffer I* as opposed to *Schaffer II*.

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[10] Accord Edmund M. Morgan, Basic Problems of Evidence 28 (4th ed. 1963):

> The truth seems to be, and many of the modern decisions expressly state, that the allocation of the burden is to be determined by considerations of fairness, convenience and policy. Such considerations require the exercise of a sound judgment and prior judicial experience, as revealed in past decisions, has strong persuasive effect.

Brian's parents argue, not without reason, that the ALJ's findings in *Schaffer I* are no longer entitled to a presumption of correctness, especially insofar as they were made based upon a misallocated burden of proof. The Court agrees with the parents. Unquestionably the operative administrative decision before the Court is that of *Schaffer II*. If *Schaffer I* has any continuing relevance, it is only be [sic] insofar as it may lead the Court not to follow findings in *Schaffer II* because the former seriously undermine the latter.

The Court, however, giving due weight to the ALJ's findings in *Schaffer II*, which is to say acknowledging their *prima facie* correctness, chooses to follow those findings. Whatever reservations the ALJ may have had in *Schaffer I* regarding certain aspects of testimony of Brian's experts, the essential and unvarying point of both *Schaffer I* and *Schaffer II* is that the evidence was in equipoise. That clearly means that, with the shifting of the burden of proof to MCPS, a conclusion favorable to Brian's parents relative to the FAPE question must follow. The Court is not persuaded by the dramatic suggestion of MCPS that the ALJ has "materially altered" the facts. Since the facts have always been, in the ALJ's judgment, in balance, the case could have been decided either way. The ALJ has now opted in favor of Brian and his parents instead of MCPS and the Court is satisfied with that conclusion. The Court concludes that MCPS did not provide Brian with a FAPE for the school year 1998-99.

That aspect of the ALJ's decision will be AFFIRMED.

VI.

The Court takes a different view with regard to the ALJ's decision to reimburse the parents for only one-half of Brian's tuition for the 1998-99 school year.

The ALJ recognized that parents are entitled to be reimbursed by the public education agency for a private placement when the public agency has not provided their child with a FAPE. *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985). But because he determined that reimbursement is "equitable in nature," *Id.* at 374, and because he found that the parents were always committed to sending Brian to private school come what may, the ALJ concluded that their reimbursement should be limited. MCPS cites authority to the effect that in circumstances such as these – where parents intend to reject any public school placement regardless of the school's recommendation – no reimbursement should be awarded at all. *See, e.g., Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 503, n.25 (6th Cir. 1998) ("Under IDEA, if the Tuckers unilaterally decided to place Barkley in LCDC, the local school district was not required to pay for that private school education, even though Barkley had a recognized disability and had been receiving special education services from the local school district."). The Court disagrees with both the ALJ and MCPS.

The Court accepts that Brian's parents were intent on finding a private school for him even as they sought to have him identified as a student with disabilities under IDEA. It is undisputed that they paid a non-refundable enrollment fee to the McLean School knowing that the Admission, Review and Dismissal (ARD) meeting that was

going to review Brian's IEP for the 1998-99 school year had not yet taken place.

Nevertheless, on April 6, 1998, the parents attended the ARD committee meeting and indicated that they would review the goals and objectives of the IEP, have private consultants review the IEP, visit the schools to observe the placements offered and thereafter recontact MCPS. From all that appears the parents substantially followed through. They arranged for private consultants to review the IEP, submitted those reviews to MCPS, and Brian's mother visited the Robert Frost Middle School where she met with one of the school's special education teachers.[11] The Court further accepts that the mother told the special education teacher at Frost that she was sure that Frost would not be appropriate for Brian. Finally, the Court accepts the ALJ's finding that the parents did not thereafter recontact MCPS or request any additional services or goals to be added to the child's IEP for the 1998-99 school year.[12] Other than this, there is no suggestion that the

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[11] Although the parents failed to visit the Herbert Hoover Middle School, the record does not indicate whether this was the result of a decision of the parents not to cooperate with MCPS, whether the visit was canceled by MCPS, or whether it was canceled by mutual agreement.

[12] However, the ALJ suggested that MCPS bore some responsibility for this state of affairs:

> The conduct of MCPS experts also leaves much to be desired. MCPS experts failed to develop an IEP that was reasonably calculated to provide the Child with "significant learning" and "meaning educational benefit." The Parents' experts had evaluated the Child and provided reports of those evaluations. Those reports were provided to MCPS. The independent assessments of the Child were extensively reviewed and considered by MCPS experts. An MCPS expert accepted the independent psycho-educational evaluation of

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parents in any way failed to cooperate in the development of the IEP. On that basis the ALJ found that there was a "predetermined decision" to have Brian attend private school which precluded an award of full funding.

The Court notes, in the context of reviewing this issue that, to the extent that the ALJ's decision involves a conclusion of law as opposed to a finding of fact, it is not entitled to a presumption of correctness. The Court reviews the ALJ's conclusions of law *de novo*. *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).

The question presented – and it is essentially a legal one – is whether parents who are committed to placing their child in private school despite what the IEP might ultimately provide (and who may nevertheless proceed with plans for the private placement) are *ipso facto* precluded from receiving full reimbursement for the placement even if it is eventually determined that the school authorities did not provide a FAPE. The Court holds that they are not.

As the Court observed in *Sanger v. Montgomery County Bd. of Educ.*, 916 F. Supp. 518, 527 (D. Md. 1996):

> Parents who unilaterally change their child's placement during the pendency of review proceedings,

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the Child but rejected the educational setting recommended. An MCPS expert accepted, in-part, the independent speech-language assessment of the Child but rejected the educational setting recommended. MCPS experts made no effort to contact the Parents' experts and discuss those reports and recommendations. Lack of contact by MCPS experts with the Parents experts may have played a role in the failure by MCPS to develop an IEP appropriate to the Child's educational needs and offer an appropriate placement.

> without the consent of school officials, may still seek reimbursement for any period in which the placement proposed by the school authority violated IDEA. *Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985); *Amann v. Stow Sch. Sys.*, 982 F.2d 644 (1st Cir. 1992). They do so, however, at their own risk; if the school authority's placement is ultimately deemed proper, the parents will not prevail.

916 F. Supp. at 527 (footnote omitted).

The critical consideration, as the Court sees it, is not whether the parents have their minds set on private school, but whether they have cooperated in good faith to attempt to develop an IEP to the maximum extent possible. If they have not, they cannot fairly be heard to complain that the school authorities have failed to develop an IEP and consequently have failed to offer a FAPE for their child. But if they have cooperated – even if throughout they have held to the belief that the best the school authorities can offer will not be good enough – they are entitled, acting "at their own risk," to place the child privately, hoping that eventually they will be able to convince an ALJ or a judge that the child was not offered a FAPE. As citizens and taxpayers, *City of Burlington* entitles them to nothing less. If subsequent developments show that the parents were correct all along – that their child was not offered a FAPE – their mental reservations are simply irrelevant. Indeed, it is quite conceivable that parents who begin the IEP process certain that the school authorities will not be able to produce an acceptable IEP may become convinced in the course of their joint exploratory efforts with the school authorities that an acceptable IEP can in fact be produced. Additionally, parents whose disabled child is already in private school, who may feel

that continuing the child in private school remains the best placement for the child, are nevertheless – as citizens and taxpayers – entitled to request the public school to attempt to develop an IEP for the child, one which might well cause them to change their minds and opt for the public instead of the private program. But in no sense should the parents be penalized merely because they may have entertained strong skepticism about the likely effectiveness of the IEP proposed by the public school authorities.

Sanger v. Montgomery County Bd. of Educ., supra, presents a useful contrast to the case at bar. In *Sanger,* the parents made it clear throughout the process that they were not inclined to consider the IEP, passing up several opportunities to go before the ARD Committee, choosing not to respond to a letter from the Local Coordinating Council that suggested a residential placement for their child and never seeking to visit the facility where the placement was proposed to be made. They were, accordingly, denied reimbursement.

In the present case, there is no indication in the ALJ's report that the parents' actions in any way thwarted the school system's ability to propose an IEP for Brian. They cooperated fully in attempting to develop the IEP, dubious though they may have been about its ultimate utility. But, as it turns out, and the ALJ has found, they were correct. Their skepticism was justified. The best that MCPS had to offer did not make the grade as a FAPE. That, in the Court's view, suffices to establish their entitlement. Accordingly, to the extent that the Court is authorized to make factual and legal findings inconsistent with those of the ALJ, it does so on this point. The parents in no way prevented the IEP from being formulated or otherwise

failed in good faith to consider it. As a result, they are entitled to full reimbursement for the 1998-99 school year.

The decision of the ALJ will thus be REVERSED insofar as he ordered 50% reimbursement for that school year. MCPS will be ordered to make full reimbursement to the parents for the 1998-99 school year.

VII.

The final matter for consideration is the request of Brian's parents that MCPS be required to pay for Brian's educational placement at the McLean School for the 1999-00 and 2000-01 school years.

They argue that the IDEA provides "stay put" protection for a student's current educational placement as a means of preserving the status quo until the underlying IDEA litigation is resolved, citing *Drinker v. Colonial Sch. Dist.,* 78 F.3d 859, 865 (3rd Cir. 1996). *See also* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.526. MCPS argues, to persuasive effect, that Brian's parents have failed to exhaust their administrative remedies for the 1999-00 and 2000-01 school years and are therefore precluded from raising the issue in this proceeding. While MCPS developed IEPs for the school years 1999-00 and 2000-01 and the parents rejected them, they never sought due process hearings as to either.

MCPS prevails on this point. The Fourth Circuit, in the recent case of *MM v. Sch. Dist.,* 303 F.3d 523, 536 (4th Cir. 2002) held that:

> When parents of a disabled child challenge multiple IEPs in court, they must have exhausted their administrative remedies for *each academic year* in which an IEP is challenged (emphasis in original).

The parents' request for reimbursement for the school years 1999-00 and 2000-01 will therefore be DENIED.

VIII.

Summing up:

1) The Court will AFFIRM the decision of the ALJ insofar as he found that MCPS did not provide Brian with a FAPE for the school year 1998-99;

2) It will REVERSE the ALJ's decision with regard to the right of Brian's parents to receive reimbursement for Brian's private school tuition for the school year 1998-99 and will ORDER that they receive full reimbursement for that year;

3) The request of Brian's parents for reimbursement for the school years 1999-00 and 2000-01 will be DENIED.

A separate Order will be ENTERED implementing this decision, including appropriate rulings on the parties' Cross-Motions for Summary Judgment.

PETER J. MESSITTE

UNITED STATES DISTRICT JUDGE

FINAL ORDER OF JUDGMENT

November 21, 2002

The Court has considered pending Motions in the captioned proceeding.

Accordingly it is for the reasons set forth in the accompanying Opinion this 21 day of November, 2002

ORDERED:

1) Defendants' Motion for Summary Judgment (Paper No. 45) is GRANTED:

A) The Court AFFIRMS the decision of the Administrative Law Judge insofar as he found that MCPS did not provide Brian Schaffer with a FAPE for the school year 1998-99;

B) The Court REVERSES the decision of the Administrative Law Judge insofar as he would award Brian's parents reimbursement for only one-half of the tuition costs for that year;

C) MCPS is DIRECTED TO REIMBURSE the Schaffers for Brian's full tuition for said school year;

2) Plaintiffs' Cross-Motion for Summary Judgment (Paper No. 51) is DENIED;

3) Defendants' Motion for Preliminary Injunction (Paper No. 41) is DENIED;

4) All other pending Motions are MOOT;

5) Final judgment is ENTERED in favor of Defendants herein;

6) Counsel for the parents may submit an appropriate Petition for Fees.

PETER J. MESSITTE

UNITED STATES DISTRICT JUDGE

BRIAN SCHAFFER, a minor, by his parents and next friends, Jocelyn and Martin Schaffer; JOCELYN SCHAFFER; MARTIN SCHAFFER, Plaintiffs-Appellees, v. PAUL VANCE, officially as Superintendent; BOARDOF EDUCATIONOF MONTGOMERY COUNTY, Defendants-Appellants. MARYLAND ASSOCIATION OF BOARDS OF EDUCATION; NATIONAL SCHOOL BOARDS ASSOCIATION; UNITED STATES OF AMERICA, Amici Curiae.

No. 00-1471.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2 Fed. Appx. 232; 2001 U.S. App. LEXIS 363

December 4, 2000, Argued
January 10, 2001, Decided

COUNSEL: ARGUED: Zvi Greismann, MONTGOMERY COUNTY PUBLIC SCHOOLS, Rockville, Maryland, for Appellants.

Michael Jeffrey Eig, MICHAEL J. EIG & ASSOCIATES, P.C., Washington, D.C., for Appellees.

ON BRIEF: Eric B. Schwartz, Deputy Executive Director, MARYLAND ASSOCIATION OF BOARDS OF EDUCATION, Annapolis, Maryland; Julie K. Underwood, General Counsel, NATIONAL SCHOOL BOARDS ASSOCIATION, Alexandria, Virginia, for Amici Curiae Boards.

Bill Lann Lee, Assistant Attorney General, David K. Flynn, Teresa Kwong, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Judith A. Winston, General Counsel, Kala Shah Surprenant, UNITED

STATES DEPARTMENT OF EDUCATION, Washington, D.C., for Amicus Curiae United States.

JUDGES: Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.

OPINION: PER CURIAM:

This case arises in the context of the formulation of an individualized education plan (IEP) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1411 et seq. The parents of Brian S. believed the IEP formulated by the Montgomery County Public School system (MCPS) would not have provided Brian with a free appropriate public education (FAPE) for the 1998-1999 school year. Accordingly, Brian's parents enrolled him in a private school and then initiated a due process hearing to obtain tuition reimbursement from MCPS. The Administrative Law Judge (ALJ) initially denied the relief requested, concluding that the IEP offered by MCPS would have provided Brian with a FAPE. Central to the ALJ's decision, however, was the conclusion that Brian's parents had the burden of proving that MCPS's IEP would not have provided a FAPE to their son.

Brian's parents appealed the ALJ's decision to the district court. The district court granted their motion for summary judgment and issued an opinion reallocating the burden of proof to MCPS. *Brian S. v. Vance,* 86 F. Supp 2d 538 (D. Md. 2000). The case was remanded to the ALJ in light of the new allocation of the burden of proof. MCPS appealed the district court's decision. The sole issue currently on appeal before this court, therefore, is that of who bears the burden of proof at an initial IEP hearing.

After briefs had been filed but prior to argument before this court, the ALJ revisited the claims made by Brian's parents. Even though the question was the subject of the pending appeal, the ALJ applied the district court's revised burden of proof scheme. After making 82 detailed findings of fact, the ALJ concluded that MCPS's proposed IEP would not have provided Brian with a FAPE. The ALJ found that Brian had a "central auditory processing" problem and that MCPS's plan failed to address this concern. The ALJ also concluded, however, that while Brian's parents were entitled to reimbursement under *Burlington School Committee v. Department of Education of Massachusetts,* 471 U.S. 359, 85 L. Ed.2d 385, 105 S. Ct. 1996 (1985), and *Florence County School District Four v. Carter,* 510 U.S. 7, 126 L. Ed.2d 284, 114 S. Ct. 361 (1993), they never seriously contemplated placing Brian in a public school. According to the ALJ, no IEP that MCPS could have proposed would have kept Brian out of private school. Thus, the ALJ granted reimbursement of only one-half of the tuition paid for Brian's private education during the 1998-1999 school year.

In light of this development, we vacate the decision of the district court and remand to that court with directions that any issue with respect to the proof scheme in this case be consolidated with the consideration on the merits. At this stage, it remains unclear what role, if any, the allocation of the burden of proof will have on the final adjudication of Brian's claim. Moreover, there may well be cross-appeals of the ALJ's decision since neither party prevailed fully at the hearing stage. If this court is to address the issue of who has the burden of proof in challenging an initial IEP, it should be in the context of a matured case or controversy rather than in the piecemeal

fashion in which this case now appears before us. Accordingly, the judgment of the district court is vacated and remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED.

BRIAN S., et al., Plaintiffs v. PAUL L. VANCE, et al., Defendants.

Civil No. PJM 99-15

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION

86 F. Supp. 2d 538; 2000 U.S. Dist. LEXIS 3664

March 15, 2000, Decided
March 15, 2000, Opinion Filed

COUNSEL: For Plaintiff(s): Bogin and Eig, Washington, D.C.

For Defendant(s): Edmund W. Law, Esquire, New Market, MD.

For Defendant(s): Zvi Greismann, Esquire, Rockville, MD.

JUDGES: PETER J. MESSITTE, UNITED STATES DISTRICT JUDGE.

OPINION BY: PETER J. MESSITTE

OPINION:

I.

This case raises the important issue, not yet resolved in the Fourth Circuit, of which party in an action brought under the Individuals with Disabilities Education Act (IDEA) bears the burden of proof at the administrative due process hearing.[1] The circuits that have addressed the

[1] The Fourth Circuit had the issue before it in *Stemple v. Board of Educ. of Prince George's County,* 623 F.2d 893, 896 (4th Cir. 1980), but declined to decide it. At least two decisions from the District of Maryland have touched upon it. In *Fritschle v. Andes,* 45 F. Supp. 2d 500 (D.

(Continued on following page)

issue are divided, some placing the burden upon the school district, others upon the party seeking to challenge the IEP, which ordinarily means the parents. In only a few cases have courts attempted to articulate a rationale for allocating the burden of proof at this level.

In the Court's view, the better part of reason leads to the conclusion that at least where an initial IEP is brought to a due process hearing, the burden of proof lies with the school district, which in this case occasions a remand to the ALJ. In contrast, where a party – either the parents or the school district – seeks to change an existing IEP, the burden at the due process hearing fairly lies with the party seeking the change. Further, as the law of this Circuit incontrovertibly establishes, once an administrative decision has been made regarding the IEP, the burden of overturning it lies with the party challenging the

Md. 1999), Judge Davis, without more, simply noted the split in authorities on the issue. *Id.* at 508 n.21. In *Schmerling v. Anne Arundel County Board of Educ.,* Civil Action No. WMN 98-2283, slip op. at 5 (D. Md. May 18, 1999), Judge Nickerson addressed the issue squarely, declining to establish a "hard-and-fast rule for all IDEA cases." On the facts, however, he affirmed the Administrative Law Judge (ALJ) who had placed the burden of proof on the parents to establish that an initial individualized education program (IEP) was inappropriate. Judge Nickerson reasoned that certain presumptions apply in IDEA cases, including a presumption of correctness of the IEP. Id., slip op. at 5-6 (citing *Johnson v. Independent Sch. Dist. No. 4,* 921 F.2d 1022, 1026 (10th Cir. 1990)). He also cited a presumption in favor of "mainstreaming" which the IEP had proposed for the child in that case. Id., slip op. at 6. Judge Nickerson pointed out that plaintiffs themselves had "participated in the proceedings as though they had the burden" and had gone through the proceeding without objection. Id., slip op. at 10. The Court respectfully disagrees with Judge Nickerson that a "hard-and-fast" rule should not be laid down in these cases or, as the Court will now undertake to explain, that the burden is upon the parents when they disagree with an initial IEP.

administrative decision. See *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1206 n.5 (4th Cir. 1990).

II.

Jocelyn and Martin S. seek reimbursement of the costs incurred by them for enrolling their son Brian in a private school for disabled children. They contend that the Montgomery County Public Schools system (MCPS)[2] failed to provide Brian with a free appropriate education as required under the IDEA, 20 U.S.C. § 1400 et seq.

There is no question that Brian is a child who is learning disabled, language-impaired and other health impaired. He has been diagnosed as having attention deficit hyperactivity disorder and needs special education and related services to benefit from school attendance. From kindergarten through seventh grade, Brian attended Green Acres School, a private school in Montgomery County where, despite small class size and significant accommodations as well as parentally provided extra services, he did not succeed.

In November 1997, Brian's mother contacted the Montgomery County school authorities and requested special education services for the 1998-99 school year, submitting outside evaluations of Brian. After reviewing the outside evaluations and conducting additional tests, MCPS found Brian eligible for special education and proposed a part-time placement for him at Hoover Middle

[2] Defendant Paul Vance was at all relevant times Superintendent of the MCPS system.

School, with an alternative placement at the Robert Frost Middle School. This was Brian's initial IEP.

Because his parents believed the IEP drafted for Brian was not reasonably calculated to provide him with appropriate educational benefit, they notified administrative authorities that they rejected the proposed placement. In May of 1998, they requested an administrative due process hearing, citing the school system's purported failure to provide Brian with a free appropriate public education. More or less simultaneously, anticipating the beginning of a new school year in the fall, Brian's parents enrolled him for the 1998-99 school year at the McLean School, a private school for learning and language disabled students located in Montgomery County.

Over three days in June and July 1998, a due process hearing was convened before an ALJ who concluded shortly after that the school authorities had offered Brian a free appropriate education. Accordingly, Brian's parents' claims for reimbursement of the tuition and costs of Brian's placement at the McLean School for the 1998-99 school year were denied.

The ALJ was particularly concerned about which party bore the burden of proof and, at the end of the first day of the hearing, asked counsel to submit brief memoranda of law on the issue. In his subsequent written decision, he stressed how important the allocation of the burden was to the outcome of the case:

> There are experts on both sides in this case who have testified with opposing points of view. The credentials of all of those experts, in their respective fields, were impressive. Because each side's experts have diverging views on the question of

> what the Child's needs were and which placement would afford the requisite educational benefit for the Child, an assignment of the burden of proof in this case becomes critical.

Decision at 29 (emphasis supplied).

Acknowledging that "[t]he case law provides support for assigning that burden to either party," he opted for the rationale expressed by the U.S. Court of Appeals for the Fifth Circuit in *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153, 1158 (5th Cir. 1986) (quoting *Tatro v. Texas,* 703 F.2d 823 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984)):

> [The IDEA] "place[s] primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parent." In deference to this statutory scheme and the reliance it places on the expertise of local education authorities, . . . [The IDEA] creates a "presumption in favor of the educational placement established by a [student's IEP]," and "the party attacking its terms should bear the burden of showing why the educational setting established by the [IEP] is not appropriate."

See Decision at 30.

Given the reluctance of the Fourth Circuit, as stated in *Tice,* 908 F.2d at 1207, "to second-guess the judgment of education professionals," the ALJ held that:

> In the matter *sub judice,* the Parents bear the burden of persuasion in establishing that the IEP prepared for the Child by MCPS and/or the placement(s) offered for the Child for the 1998-1999 school year fail to afford the Child an opportunity for a FAPE.

Decision at 31.[3]

The ALJ then proceeded to discuss various aspects of the record in favor of and against the proposed IEP. He cited the testimony of Drs. Ruth D. Spodak and Carol A. Kamara, Brian's experts on learning disabilities and speech/language pathology respectively. Both stated that the IEP failed to offer an appropriate educational benefit, since in their view Brian requires small, self-contained special education classes of a kind not included in the IEP. Dr. Spodak testified that such classes were essential to Brian's education because they would tend to minimize the distractions interfering with Brian's ability to learn. Dr. Kamara testified that Brian suffers from a "central auditory processing" problem that increases his susceptibility to distractions, necessitating a small, self-contained learning environment.

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[3] In a footnote to this statement, the ALJ cited an additional reason for assigning the burden of proof to Brian's parents. He found that they were apparently committed to sending Brian to McLean School regardless of what the IEP might show, terming their appearance at the ARD meeting "a mock effort." Decision at 32 n.6. Assuming the parents were irrevocably committed to McLean, that might undercut any claim by them that the school authorities failed to develop a plan, see, e.g., *Sanger v. Montgomery County Bd. of Educ.,* 916 F. Supp. 518, 525 n.7 (D. Md. 1996). But there is no reason why the parents' decision should occasion a shift in the burden of proof. Parents may unilaterally change their child's placement during the pendency of review proceedings, without the consent of school officials, and may receive reimbursement if it is later determined that the proposed placement violated the IDEA. Parents act at their own risk, however, if it is eventually determined that the IDEA was not violated. *Id.* at 527.

On the other hand, the ALJ noted that Dr. Spodak's testimony differed in some respects from an earlier report she and members of her staff had written about Brian's learning disabilities. This, along with the fact that she herself had spent only ten minutes with Brian, caused the ALJ to "question[] the probative value of Dr. Spodak's opinion." Decision at 36. Similarly, the ALJ noted that Dr. Kamara's opinion was compromised to some extent by her acknowledgment of the diagnostic limitations of the test she relied upon in diagnosing Brian's "central auditory processing" problem and by her refusal to offer an opinion as to whether Brian's speech-language disability is mild, moderate, or severe. Finally, the ALJ noted that two experts from MCPS, Dr. Barbara J. Butera and Pamela Zahra, a speech pathologist, testified that the IEP was appropriate to Brian's needs and that, in their view, he suffers not from a "central auditory processing" problem but from a mild speech-language disability.

Ultimately, the ALJ concluded that the parents had not carried their burden of proof:

> The Parents have failed to persuade the ALJ that the April 6, 1998 IEP was not reasonably calculated to provide educational benefit, or that the placement(s) offered by MCPS are not appropriate to provide for the Child's educational needs in accordance with the IDEA.

Decision at 42.

Before the Court, Brian's parents argue, among other things, that the ALJ erred in assigning the burden of proof

to them. The parties have filed Cross-Motions for Summary Judgment on this and other points.[4]

III.

Deferring case citations for a moment, it may be useful to begin by considering the different settings in which a challenge to an IEP may arise:

1) there is the initial IEP, proposed by the school authorities the first time it is sought for a child, with which the parents do not agree and as to which they seek an administrative due process hearing;

2) there is the existing IEP, at one time agreed to by everyone, which either the parents or the school district seek to change against the wishes of the other, whereupon the matter goes to an administrative due process hearing; and

3) there is the IEP that has been passed upon by an independent ALJ, which a party seeks to challenge in a court proceeding.[5]

The cases do not ordinarily make these distinctions, but in fact there appears to be reason to do so.

In the last scenario, the law and policy considerations are the most sharply defined. As indicated, in the Fourth

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[4] Because the burden of proof issue is dispositive, the Court does not address the other issues raised by the parties in their Motions.

[5] There is at least one further scenario, in which both the parents and the school district seek to change an existing plan. Discussion of which party has the burden of proof in that setting is best left for another day.

Circuit the burden of proof on appeal from an administrative decision is upon the party challenging the decision. *See Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991); *Tice*, 908 F.2d at 1206 n.5; *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 n.2 (4th Cir. 1988). This, according to the Fourth Circuit, arises out of deference to the underlying state administrative process. *Tice*, 908 F.2d at 1206 n.5. This undoubtedly flows from the general belief that, once an impartial judicial hearing has been held and a decision made – even at the administrative level – the burden of overturning the decision ought to be upon the party challenging it.[6]

Moving back to the next scenario, where an existing IEP is sought to be changed, if for no other reason than that it seems "fair[]," *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir. 1983), it is not unreasonable to conclude that the burden of persuasion as to the change should be borne by the party seeking the change. Numerous cases so hold. *See, e.g., Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir. 1995); *Doe v. Board of Educ. of Tullahoma City Schools*, 9 F.3d 455, 458 (6th Cir. 1993); *Johnson v. Independent Sch. Dist. No. 4 of Bixby, Tulsa County, Oklahoma*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights*, 790 F.2d at 1158; *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 919 (1st Cir. 1983); *Tatro*, 703 F.2d at 830.[7]

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[6] But not all circuits agree that assignment of the burden should be thus. In *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995), for instance, the Third Circuit held that the burden should always be upon the school district. *See also Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993).

[7] It is not always clear from the language of these cases whether they are addressing the burden of proof at the administrative level, in the district court, or both. The cases are often characterized, however,

(Continued on following page)

These authorities are in accord with the observation made by Professor Wigmore that the burden of proof is frequently placed "upon the party to whose case the fact is essential," 9 Wigmore on Evidence, § 2486 at 288 (italics omitted). In the context of an IDEA case, this argues for the proposition that the party seeking a change in the IEP should have to explain why the change is appropriate.

Despite this, a number of cases hold that the burden of proof at the administrative level should always lie with the school district, even when the parents are seeking to change an existing IEP. *See Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994); *see also Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Independent Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995); *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1034-35 (3d Cir. 1993); *Lascari v. Board of Educ. of Ramapo Indian Hills Regional High Sch. Dist.*, 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989).

The reasoning of these holdings varies from none at all, i.e. from mere assertion, to a brief reference to the statutory obligation to accommodate disabled children, to, in very few cases, a rather elaborate explanation. Among the cases that merely assert that the burden is on the school district are *Clyde K*, 35 F.3d at 1398, and *Walczak*,

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as standing for the proposition that the party seeking to change an existing IEP bears the burden of proof at the administrative level. See, e.g., *T.H. v. Board of Educ. of Palatine Community Consolidated Sch. Dist. 15*, 55 F. Supp. 2d 830, 835 n.5 (N.D. Ill. 1999); Schmerling, slip op. at 5; *Manchester Sch. Dist. v. Charles M.F.*, 1994 U.S. Dist. LEXIS No. CIV. 92-609-M, 1994 WL 485754, at *4 (D.N.H. Aug. 31, 1994).

142 F.3d at 122. In the middle category is *Wall v. Mattituck-Cutchogue School District,* 945 F. Supp. 501 (E.D.N.Y. 1996), to wit:

> It has consistently been held that the burden throughout the administrative process is placed upon the school district. . . . This is in obvious recognition of the school's overarching obligation to attend to the specific educational needs of children with disabilities. See S.Rep. No. 94-168 to P.L. 94-142, at 9, reprinted in 1975 U.S.C.C.A.N. 1425, 1433 ("It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity").

945 F. Supp. at 511 (citations omitted).

Undoubtedly the most elaborate rationale is set forth in *Lascari,* which bears quoting *in extenso:*

> We believe it is more consistent with the State and federal scheme to place the burden on the school district not only when it seeks to change the IEP, but also when the parents seek the change.
>
> Various considerations lead us to that conclusion. Underlying the State and federal regulations is an abiding concern for the welfare of handicapped children and their parents. Consistent with that concern, the basic obligation to provide a handicapped child with a free, appropriate education is placed on the local school district. It is the district that must identify handicapped children and then formulate and implement their IEPs. Finally, the regulatory scheme vests handicapped children and their parents with numerous

> procedural safeguards. Those safeguards include the right to counsel and to the advice of experts, 20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.508(a)(1); to present evidence and cross-examine witnesses, 20 U.S.C. § 1415(d)(2); 34 C.F.R. § 300.508(a)(2); to "have the child who is the subject of the hearing present," id. at § 300.508(b)(1); and to a public hearing, id. at § 300.508(b)(2). Like those procedural safeguards, the allocation of the burden of proof protects the rights of handicapped children to an appropriate education.
>
> Our result is also consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens. In the past, we have placed either the burden of production, see *Ryan v. Mayor & Council of Borough of Demarest,* 64 N.J. 593, 604-05, 319 A.2d 442 (1996), or the burden of proof on the party with the better access to relevant information, *Andersen v. Exxon Co.,* 89 N.J. 483, 500, 446 A.2d 486 (1982); *Brundage v. New Jersey Zinc Co.,* 48 N.J. 450, 475-77, 226 A.2d 585 (1967). The school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP. Through the child study team, the board generally has extensive records pertaining to a handicapped child. The board is also conversant with the federal and State laws dictating what the district must provide to handicapped children in order to comply with the EAHCA. Cf. *S-1 v. Turlington,* 635 F.2d 342, 348-49 (5th Cir.) (burden on district to raise question whether student's misconduct is based on handicap because parents lack wherewithal to know rights under EAHCA), cert. denied, 454 U.S. 1030, 102 S. Ct. 566, 70 L. Ed. 2d 473 (1981), abrogated on other

> grounds by *Honig v. Doe,* 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.

116 N.J. at 44-45; 560 A.2d at 1188.[8]

As to the first scenario – that in which an initial IEP is disputed at a due process hearing – all of Lascari's considerations came into play but there is more. In the initial situation, unlike the change situation, the parents have never agreed that the IEP is appropriate. By definition, they have disagreed and sought a determination by an impartial hearing officer, one, it may be noted, who by law may not be associated with the school authority. 20 U.S.C. § 1415(f)(3). In this circumstance, the only sense in which "change" is involved is that the parents wish to change what the school authorities have unilaterally proposed. Since the IEP is supposed to be a joint enterprise, it is debatable whether an IEP can even be said to exist if a parent has never agreed to it. The situation seems much like that in which two parties are engaged in a dispute before litigation has occurred, following which litigation is initiated. If one assumes, again along with

[8] This Court would add a further observation: The Congressional statements and declarations that appear at the beginning of the IDEA refer to minority children, e.g. 20 U.S.C. § 1400(b)(7) to (10), in particular economically disadvantaged minorities. Id. at § 1400(b)(8)(C). Strictly speaking, if parents such as these have the burden of persuasion at the administrative level, their failure to put on a prima facie case would mean that the school district could rest without having to produce any evidence in justification of the IEP. On the other hand, parents who could afford to retain counsel and experts, while still having the burden of persuasion, could at least force the school district to produce evidence in support of the IEP. Query, whether such a result is fair, apart from whether Congress could have intended it.

Wigmore, that "the party having in form the affirmative allegation" should carry the burden, see Wigmore, § 2486 at 288 (italics omitted), it would seem entirely reasonable to assign the burden to the school authority to affirmatively establish the propriety of its plan.[9] As one commentator has pointed out, this in no way reflects a lack of deference to the expertise of the school authorities. But there may be, she writes, a tendency to "confuse the Rowley Court's deference to school officials on methodological matters with matters of burden of proof." Dixie Snow Huefner, "Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?" 14 Harv. J.L. & Pub. Pol'y 483, 512 (1991). To acknowledge the expertise of school officials is not the same as saying that they should not have to demonstrate to an impartial fact-finder, at least in the first instance, that the proposed goals and objectives of the IEP address the student's needs, or that the IEP delivers services to those needs in a way that will provide progress towards those goals and objectives, or that the proposed criteria to evaluate the child's progress are in place and can actually measure the extent to which the objectives are obtained. Id.

Wigmore summarizes the burden of persuasion issue thus:

[9] Of course the same argument could be made in support of assigning the burden to the school board at any level – that it should always be required to demonstrate the affirmative of the plan that it proposes. That, in fact, appears to be the rationale of those cases that have assigned the burden to the school board at all levels.

> There is . . . no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any.
>
> There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness.

Wigmore, § 2487 at 292 (footnotes omitted).[10]

To the extent that the Court writes on a clean slate, it holds that with regard to an initial IEP, experience and fairness dictate that the school district should have the burden of proof at any administrative due process hearing that might follow. While the issue is not squarely presented by this case, in order to avoid any confusion in the matter, it seems opportune to posit as equally reasonable that, when a change is sought in an existing IEP, the party seeking the change should have the burden of proof.

IV.

Applying these considerations to the facts of the present case, the Court concludes that the ALJ erred in his allocation of the burden of proof. Because he himself saw

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[10] Accord Edmund M. Morgan, Basic Problems of Evidence 28 (4th ed. 1963):

> The truth seems to be, and many of the modern decisions expressly state, that the allocation of the burden is to be determined by considerations of fairness, convenience and policy. Such considerations require the exercise of a sound judgment and prior judicial experience, as revealed in past decisions, has strong persuasive effect.

the allocation issue as "critical" to the outcome, eventually holding that the parents had failed to sustain their burden, the Court is unable to say how the ALJs' decision might differ if the burden of proof were properly assigned. The Court declines, at this stage at least, to substitute its own weighing of the evidence for that of the ALJ.

Under the circumstances, the Court deems it appropriate to remand the case to the ALJ for proceedings consistent with this Opinion.

A separate Order will issue implementing this decision.

PETER J. MESSITTE

UNITED STATES DISTRICT JUDGE

March 15, 2000

ORDER

Accordingly, for the foregoing reasons, it is this 15th day of March, 2000 ORDERED:

1) Plaintiff's Motion for Summary Judgment is GRANTED;

2) Defendant's Motion for Summary Judgment is MOOT;

3) This case is REMANDED to the Administrative Law Judge for proceedings consistent with this Opinion; and

4) The Clerk of Court shall CLOSE this case.

PETER J. MESSITTE

UNITED STATES DISTRICT JUDGE

BRIAN SCHAFFER, A MINOR,	* **BEFORE STEPHEN J. NICHOLS**
BY HIS PARENTS,	* **ADMINISTRATIVE LAW JUDGE**
JOCELYN AND MARTIN SCHAFFER,	* **OF THE MARYLAND OFFICE OF**
AND AS HIS NEXT FRIENDS	* **ADMINISTRATIVE HEARINGS**
VS.	*
MONTGOMERY COUNTY	* **Old OAH# 98-MSDE-MONT-OT-016662**
PUBLIC SCHOOLS	* **New OAH# MSDE-MONT-OT-00000214**

* *

DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER
APPEAL RIGHTS
APPENDIX

STATEMENT OF THE CASE

This case arises from a request by Jocelyn S. Schaffer and Martin P. Schaffer ("Parents"), the mother and father, respectively, of Brian Schaffer ("Child"), for a hearing to review the provision of a free appropriate public education ("FAPE") for the Child as a student with disabilities for the 1998-1999 school year. The local education agency responsible for providing the Child a FAPE is the Montgomery

County Public Schools ("MCPS"). On May 26, 1998, the Parents filed the request with the MCPS.[1]

Pursuant to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(c) (1997), 34 C.F.R. § 300.510 (1996), Md. Code Ann., Educ. § 8-413 (1997), and the Maryland State Department of Education Guidelines for Maryland Special Education Mediation/Due Process Hearings, the above-captioned case was heard over a period of three days (June 16, 1998, June 23, 1998, & July 2, 1998) before Stephen J. Nichols, Administrative Law Judge ("ALJ"), Office of Administrative Hearings. The hearing was conducted at the offices of the MCPS, 850 Hungerford Drive, Rockville, Maryland. Michael J. Eig, Esquire, Bogin and Eig, P.C., represented the Parents and Child. Edmund W. Law, Esquire, represented the MCPS.

On July 9, 1998, a decision was issued by the ALJ. That decision concluded that the Individual Education Program drafted for the Child for the 1998-1999 school

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[1] In pertinent part, the Request For Due Process Hearing reads:

> "[The Child] is a student in Montgomery County, Maryland. At issue is whether the placement recommended by MCPS for the 1998-1999 school year at Hoover Middle School is appropriate, and if not, whether the placement at the McLean School is appropriate. Parents have duly notified MCPS of their intention to enroll [the Child] at the McLean School and have informed them of their disagreement with the proposed program. The placement at Hoover is too large, not structured enough, has insufficient services and does not include required related services. Additionally, we are in disagreement with the [i]ntensity of service proposed and do not believe it complies with COMAR requirements. The IEP is also at issue as we do not believe MCPS has identified [the Child's] complete disability and have not signed the IEP. . . ."

year, and the placement(s) offered by MCPS for the Child, afforded the Child an opportunity for a FAPE for the 1998-1999 school year. The ALJ denied the Parents' request for an order directing placement of the Child at the McLean School of Maryland for the 1998-1999 school year.

The Parents and Child appealed the ALJ's decision to federal court. On March 15, 2000, the Honorable Peter J. Messitte in *Brian S., et al. vs. Paul L. Vance, et al.*, Civil No. PJM 99-15, United States District Court (MD), granted a Motion for Summary Judgement on behalf of the Parents and Child and issued an opinion reallocating the burden of proof from that applied by the ALJ in the July 9, 1998 decision. The United States District Court further issued an order of remand to the ALJ directing further administrative proceedings in this matter consistent with that opinion.

After several pre-hearing telephonic conferences with counsel for both parties, the ALJ issued a pre-hearing conference order in order to conduct a "review of the record" as it existed, to reconsider findings of fact as found and/or to consider additional findings of fact proposed by the parties. A request by the Parents and Child to present additional evidence during the remand hearing was denied. The parties were directed to provide pre-hearing written statements to identify findings of fact in the decision issued by the ALJ on July 9, 1998, to be reconsidered and/or to add proposed findings of fact in this case. Not later than October 10, 2000, those pre-hearing written statements were received by the ALJ from both parties.

A two-day remand proceeding was held. On October 24, 2000, a review of the existing record was conducted by the ALJ *in camera* at the Administrative Law Building in

Hunt Valley, Maryland. Counsel were excused from attending the first day of the remand proceeding. On October 25, 2000, the second day of the remand proceeding took place. The second day provided an opportunity for the parties to present oral argument and was held at the offices of the Office of Administrative Hearings located in Wheaton, Maryland. Michael J. Eig, Esquire. Michael J. Eig and Associates, P.C. represented the Parents and Child. Zvi Greismann, Esquire, represented the MCPS.

Procedure in this case is governed by the "contested cases" provisions of the Administrative Procedure Act. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp 2000) and the Rules of Procedure of the Office of Administrative Hearings, Code of Maryland Regulations ("COMAR") 28.02.01

ISSUES

The issues in this matter are:

(1) Whether the Individual Education Program ("IEP") prepared for the Child by the MCPS, and/or the placement(s) for the Child offered by MCPS, afforded the Child an opportunity for a FAPE for the 1998-1999 school year;[3] and

(2) Whether the Parents should be reimbursed for unilateral placement of the Child at the McLean School of

[3] An IEP is a "blueprint" for assisting a student with special education needs. Its development requires evaluation of the disabled student's present level of performance and his unique needs for special education and any related services. The IEP is to be reviewed not less than annually by school officials and the student's parents or guardians and revised as needed. 20 U.S.C. § 1414(Q)(1997)

Maryland for the 1998-1999 school year under the law outlined in *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996 (1985); *Carter v. Florence County School District*, 950 F.2d 156 (4th Cir. 1991); and *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993).

SUMMARY OF THE EVIDENCE

EXHIBITS

At the hearing conducted on June 16, 1998, June 23, 1998, & July 2, 1998. MCPS submitted thirty-three (33) documents admitted into the record as exhibits and the Parents submitted nineteen (19) documents admitted into the record as exhibits. The parties stipulated to the admission of the majority of each others' exhibits. Many of the exhibits admitted on behalf of each party are duplicated in the exhibits of the opposing party. A complete list of the exhibits that were admitted is found in the appendix to this decision.

WITNESSES

At the hearing conducted on June 16, 1998, June 23, 1998, & July 2, 1998. Caroline MacNichol, Custodian of Records. McLean School of Maryland; Linda J. Brand, Special Education Teacher, Herbert Hoover Middle School, MCPS; Barbara J. Butera, School Psychologist, MCPS; Pamala Zahra. Speech/Language Pathologist, Herbert Hoover Middle School, MCPS; Doris Shiery, Special Education Teacher, Robert Frost Middle School, MCPS, and Vickie Strange-Moscoso, Special Education Supervisor, MCPS, testified on behalf of the local education agency.

Linda J. Brand was admitted as an expert witness in special education. Barbara J. Butera was admitted as an expert witness in school psychology. Pamala Zahra was admitted as an expert witness in Speech/Language Pathology Doris Shiery was admitted as an expert witness in special education.

Ruth B. Spodak, Ph.D., Ruth B. Spodak, Ph.D., & Associates; Carol A. Kamara, Ph.D. CCC-SLP/A. The Kamara Center, Nancy Shapiro, Head of the Middle School, Green Acres School; and the Child's mother testified on behalf of the Parents and the Child.

Ruth B. Spodak was admitted as an expert witness in psychology and learning disabilities Carol A. Kamara was admitted as an expert witness in Speech/Language Pathology and Audiology.

FINDINGS OF FACT

Based upon the evidence presented, and after reallocating the burden of proof from the Parents and Child to MCPS, the ALJ finds the following facts by a preponderance of the evidence:

1. The Child's date of birth was May 13, 1984.

2. The Child has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and has been receiving medication for this diagnosis since he was 7 years old. Since Spring 1997, the Child has been taking Welbutrin. His medication was changed from Dexedrine to Welbutrin because Dexedrine, although it was more effective, caused depression and had to be discontinued.

3. The Child has attended Green Acres School since pre-kindergarten. Green Acres School is not part of the MCPS. Green Acres School is a private school. Before the 1997-1998 school year, while he was attending Green Acres, the Parents did not request assessment of the Child as a student with disabilities under IDEA or other support from MCPS. Green Acres School does not have a special education program. Green Acres has small classes and often makes accommodations to address the educational needs of its students.

4. The travel time from the Child's home to Green Acres School is approximately 15 minutes.

5. While a student at Green Acres, the out-of-the-ordinary educational needs of the Child were recognized. The teachers and administrators at the school consulted with Charla Levine, a MA special needs consultant, who made recommendations on how the school could accommodate the Child's educational needs.

6. While attending Green Acres, the Child demonstrated difficulty with productivity and quality of class work. In 2nd grade, the Child pretended that he was reading during silent reading time. In 3rd grade, the teacher worked with the Child on reading comprehension using 2nd grade materials. In 4th grade, tutoring began and continued through 5th, 6th, and 7th grades.

7. During the 1997-1998 school year, because of his prior academic performance, the Child attended Green Acres 7th Grade class on a probationary status.

8. During the 1997-1998 school year, the Child was in regular education classes with a student-to-teacher ratio of not greater than 13:1. The Child experienced

difficulty with writing and reading tasks. Class work productivity was a significant problem. The Child had difficulty staying on task.

9. During the 1997-1998 school year, the Child was receiving instructional classroom and testing accommodations because of his learning difficulties. Accommodations for the Child at Green Acres School included individual attention from classroom teachers, a peer buddy to ask for clarification of direction, priority seating, working with a tutor 3 times per week, reading support, extra time on class assignments and standardized tests, tutor rewriting of essay questions on his tests to multiple choice or short answer, assignments not penalized if turned-in late, and exclusion of Spanish class from his educational program.

10. While Green Acres School made more accommodations, its teachers and administrators came to believe that the Child needed more support than the school could offer. During October 1997, at a meeting with Green Acres School staff, the Child's mother was told that the Child needed placement for the next school year in a school designed to address his learning difficulties.

11. At Green Acres School, the Child received a passing grade in all his subjects for the third trimester of the 1997-1998 school year.

12. The Herbert Hoover Middle School is part of the MCPS system.

13. On November 7, 1997, the Child's mother telephoned the Herbert Hoover Middle School and spoke with Linda Brand, a MCPS special education teacher. The Child's mother indicated she wanted the Child assessed

for identification as a student with disabilities. During this phone conversation, the Child's mother stated that she had to find another private school for the Child to attend, and she mentioned the Lab School as a possibility. Linda Brand informed the Child's mother that MCPS had a wide variety of services to meets [sic] the needs of students with a variety of disabilities and MCPS may have a program that would meet the Child's needs.

14. On November 11, 1997 the Child's mother contacted the office of Carol A. Kamara, Ph.D. CCC-SLP/A, an independent speech-language pathologist/audiologist, for the purpose of arranging for a communication assessment of the Child.

15. On December 9, 1997, Carol A. Kamara conducted a comprehensive speech and language assessment of the Child employing a variety of formal and informal measurements. The assessment took 3-4 hours.

16. After the December 9, 1997 assessment, Carol A. Kamara produced a written report. The written report reads, "[the Child's] auditory processing of words was so severely impaired by discrimination issues that his ability to execute any auditory tasks should be considered possibly compromised by this one feature." The written report also reads, that the Child's oral motor evaluation "pattern suggested some articulation dyspraxia".... The report recommends, "[the Child's] serious needs in reading, writing, spelling, and probably math, indicate that he should be placed in a self-contained, full-day special education program." (MCPS Exhibit #3)

17. On December 19, 1997, the Child's mother provided Green Acres School with an "Authorization For Release Of Confidential Information" in order that the Child's academic records could be sent to the McLean School and to the Lab School in Washington, D.C. The McLean School of Maryland and the Lab School are private schools. (MCPS Exhibit #32)

18. On December 30, 1997, the Parents submitted an application for admission of the Child as a student in the 8th Grade at the McLean School of Maryland for the 1998-1999 school year. The Parents also submitted an application for admission of the Child as a student in the 8th Grade at the Lab School.

19. During December 1997, the Parents met for one hour with Ruth B. Spodak, Ph.D., a psychologist, at the offices of Ruth B. Spodak, Ph.D. & Associates, to provide her with the Child's history as part of arranging for an independent psycho-educational evaluation of the Child.

20. On January 5, 1998, the Child came to the offices of Ruth B. Spodak, Ph.D. & Associates. There he met with Ruth Spodak for 10-15 minutes prior to testing conducted by her associates. On January 5, 1998 and January 6, 1998. Diane Toby, Ph.D., psychologist, and Deanna Greenstein, Ph.D., a psychology associate, conducted psycho-educational testing of the Child. The full evaluation conducted by Ruth B. Spodak, Ph.D. & Associates, included a review of records, information obtained from the Parents, formal testing, and behavioral observations of the Child.

21. After the evaluation of the Child, Ruth Spodak, Diane Toby, and Deanna Greenstein produced a written

report. The report discussed the social/emotional functioning, potential for academic achievement, and cognitive abilities of the Child. The report indicated that the Child was bright and intelligent. The report indicated that because of the Child's learning difficulties, his cognitive test results (in the average range of intelligence) underestimated his true abilities. An excerpt from the report reads. "[the Child] will do best in a small, structured setting, where expectations are clear and consistent." (MCPS Exhibit #7)

22. On January 14, 1998, MCPS sent a letter to the Parents advising that a "screening [Admission, Review, and Dismissal ("ARD") committee] meeting" had been scheduled by MCPS at the Herbert Hoover Middle School on January 29, 1998. The purpose of this meeting was, "to discuss [the Child's] educational needs, determine whether an educational disability is suspected, and determine follow up-assessment as needed." (MCPS Exhibit #9)

23. The ARD committee meeting scheduled for January 29, 1998, was rescheduled at the request of the Parents. The attorney for the Parents had a schedule conflict on January 29, 1998.

24. On February 19, 1998, Linda Brand observed the Child at Green Acres, reviewed teacher reports, classroom observations, and spoke with Nan Shapiro, Head of the Middle School, Green Acres School.

25. On February 26, 1998, a meeting of the ARD committee at the Herbert Hoover Middle School was held. Those attending the meeting included, among others, the Parents: an attorney for MCPS; Caroline Kursman, Principal, Herbert Hoover Middle School; Jeff Hill, Assistant Principal, Herbert Hoover Middle School; Linda

Brand, special education teacher, Herbert Hoover Middle School; Nancy Shapiro, Head of the Middle School, Green Acres School, Barbara Butera, School Psychologist, MCPS; and Pamala Zahra, Speech/Language Pathologist, Herbert Hoover Middle School.

26. The Parents fully participated in the ARD committee meeting held on February 26, 1998.

27. Test results, teacher referrals, observation reports, a parent questionnaire, and educational records of the Child were reviewed by the ARD committee before the February 26, 1998 meeting. These documents included, but were not limited to, an observation report from Nancy Shapiro, Head of the Middle School, Green Acres School, a report from Charla Levine, Special Needs Consultant, Green Acres School, Narrative Report Cards on the Child from Green Acres School; an observation report of the Child at Green Acres School from Linda Brand; and reports of private assessments of the Child (from Ruth B. Spodak, Ph.D. & Associates, and Carol A. Kamara, Ph.D. CCC-SLP/A).

28. At the February 26, 1998 ARD committee meeting, the educational history of the Child was discussed. As a result of the meeting, the ARD committee "[suspected][the Child] may have a [speech-language] disability, and/or learning disability in [areas] of reading [and/or] writing." (MCPS Exhibit #15)

29. The ARD committee decided to further review the private assessments of the Child (from Ruth B. Spodak, Ph.D. & Associates, and Carol A. Kamara, Ph.D. CCC-SLP/A) that were provided to the committee, to conduct informal assessments of the Child, and to reconvene to evaluate the Child's needs in conjunction with all data.

30. At the end of the February 26, 1998 ARD committee meeting, the Parents were told that the next meeting of the ARD would be an evaluation meeting to determine if the Child met the criteria for special education services as a student with a disability.

31. At the end of the February 26, 1998 ARD committee meeting, MCPS obtained permission from the Parents to conduct its own assessments of the Child (as appropriate), to contact Ruth B. Spodak, Ph.D., and Carol A. Kamara, Ph.D. CCC-SLP/A (in order to discuss their reports), and to contact the Child's teachers and tutor at Green Acres School (to gain information on the Child). If MCPS sought to conduct additional formalized testing of the Child its personnel were to notify the Parents of that additional formalized testing.

32. On or about March 1, 1998, the Parents were notified by the McLean School of Maryland that the Child had been accepted as a student in the 8th Grade for the 1998-1999 school year. The letter of acceptance specified that the Parents would have to pay a non-refundable enrollment fee of $750.00 by March 16, 1998, in order to reserve a place for the Child for the 1998-1999 school year. By March 16, 1998, the Parents paid a non-refundable $750.00 enrollment fee to the McLean School of Maryland to guarantee that a placement would be available for the Child at that school for the 1998-1999 school year.

33. Select MCPS members of the February 26, 1998 ARD committee were assigned to review the private assessments of the Child from the perspective of their expertise, conduct further informal assessments of the Child as indicated, and to make a report to the next ARD committee meeting.

34. Linda Brand reviewed the reports of the private assessments of the Child (from Ruth B. Spodak, Ph.D & Associates, and Carol A. Kamara, Ph.D. CCC-SLP/A).

35. On March 12, 1998, Linda Brand met with the Child at the Herbert Hoover Middle School. During this meeting, Linda Brand administered the Reading Comprehension test of the Wechsler Individual Test of Achievement and the Qualitative Reading Inventory to the Child and conducted an informal assessment of the Child's needs for special education services.

36. Linda Brand prepared goals and objectives for the Child's IEP that were intended to incorporate his needs, from the special education perspective, identified in the reports of the assessments of the Child from Ruth B. Spodak, Ph.D. & Associates, and Carol A. Kamara, Ph.D. CCC-SLP/A.

37. Pamala Zahra reviewed the report of the private assessment of the Child conducted by Carol A. Kamara, Ph.D. CCC-SLP/A.

38. On March 12, 1998, Pamala Zahra met with the Child at the Herbert Hoover Middle School and conducted an informal assessment of the Child over a period of one hour. This informal assessment included, among other activities, several tasks designed to informally assess the Child's phonological processing skills and the administration of one subtest. Understanding Ambiguous Sentences, from the Test of Language Competence. Pamala Zahra did some contextual listening, sound discriminating activities and verbal reasoning activities for language competence.

39. Pamala Zahra disagreed with some of the Child's needs identified in the report of the assessment conducted by Carol Kamara. Pamala Zahra disagreed with Carol Kamara's conclusion that the Child had weak phonological or sound system skills. Pamala Zahra did not agree that the Child had "severe auditory processing difficulties related to discrimination at the word level," and "articulation dyspraxia" (MCPS Exhibit=20)

40. Pamala Zahra prepared goals and objectives for the Child's IEP that were intended to incorporate his needs, from the speech-language perspective, identified in the report of the assessment from Carol Kamara, with which she had agreed.

41. Barbara Butera reviewed the report of the psycho-educational evaluation of the Child from Ruth B. Spodak, Ph.D. & Associates.

42. On March 12, 1998, Barbara Butera met with the Child at the Herbert Hoover Middle School. During this meeting, Barbara Butera interviewed the Child, administered the Behavior Assessment System for Children (BASC) to the Child, and observed the Child's interaction with Linda Brand and Pamala Zahra.

43. Barbara Butera's observation and psychological assessment of the Child on March 12, 1998, was consistent with the assessment of the Child presented in the report on the Child from Ruth B. Spodak, Ph.D. & Associates.

44. On March 13, 1998, MCPS sent a letter to the Parents advising that an ARD meeting had been scheduled by MCPS for March 26, 1998. The notice also offered an alternate date of April 6, 1998, for the meeting. The

purpose of this meeting was, "to determine the answers to the following questions:" (MCPS Exhibit #18)

> 1 Does the assessment indicate the presence of a disability?
>
> 2 Is [the Child]educationally disabled?
>
> 3 If there is an educational disability, what are the goals and objectives for the Child's [IEP]?
>
> 4 What amount of special education and related service is necessary to meet [the Child's] goals and objectives in the least restrictive environment (LRE)?
>
> 5 What is the appropriate placement to meet the identified goals and objectives?

45. On April 6, 1998, the MCPS held a second ARD committee meeting on the Child. Those attending the meeting included, among others, the Parents, an attorney for the Parents, an attorney for MCPS, Caroline Kursman, Jeff Hill, Linda Brand, Barbara Butera, and Pamala Zahra.

46. The April 6, 1998 ARD committee received and considered reports provided by Linda Brand, Barbara Butera, and Pamala Zahra on the Child (and on the private assessments of the Child from Carol A. Kamara, Ph.D., CCC-SLP/A, and Ruth B. Spodak, Ph.D. & Associates).

47. The Parents fully participated in the ARD committee meeting held on April 6, 1998.

48. At the April 6, 1998 meeting, the ARD Committee reviewed available information, discussed the Child's

need for special education and related services, and drafted an IEP for the Child for the 1998-1999 school year.

49. On April 6, 1998, the ARD Committee identified the Child as a student with a speech-language disability and a learning disability.

50. The April 6, 1998 IEP specified an Intensity IV special education program for the Child with 15.8 hours of special education and .75 hours (45 minutes) of speech-language therapy as a related service each week.[3] Under the IEP, the special education services would be provided in an "inclusion model" setting during the Child's World Studies, Science and English classes. The Child was to be in a regular education class for Math, Physical Education, and Arts Rotation. The Child was also to receive one period (45 minutes) of support each day in a self-contained special education writing resource class in lieu of the requirement of a class in foreign language.

51. Supplementary aids and services specified in the Child's April 6, 1998 IEP included preferential seating in class, repetition of direction, use of a computer, testing modifications, and copies of notes (as needed).

52. The April 6, 1998 IEP proposed a placement for the Child at the Herbert Hoover Middle School.

[3] "An intensity of service is indicated by the number of hours a service is provided to a student with a disability. Intensities of service also establish caseloads or class size for the professionals who provide these services." COMAR 13A.05.10A(1). Intensity IV was defined at COMAR 13A.05.01.10E(5). The current regulations no longer define or refer to an "intensity of service."

53. The Herbert Hoover Middle School was the "home school" for the Child. A "home school" is the school within MCPS that a student would normally attend if the student was not a student with disabilities. The travel time from the Child's home to the Herbert Hoover Middle School would be approximately six (6) minutes.

54. At the Herbert Hoover Middle School, the .75 hours (45 minutes) of speech-language therapy each week would be provided to the Child in a small group setting. In this small group setting, a speech-language therapist would provide services to a group of 2-5 students. Students would also be seen on an individual basis, as determined by the speech pathologist.

55. Under the "inclusion model" at the Herbert Hoover Middle School, the Child would be in a class of between 24-28 students in the World Studies, Science and English classes. The English class had an upper cap of 24 students and was designed for students who needed more support in writing and reading. The World Studies, Science and English classes would be co-taught by a certified special education teacher and another teacher (not certified as a special education teacher). The special education certified teacher would sit with and provide special education services to 5-6 students in the class who had IEPs. Among other services, the special education certified teacher would provide copies of notes, study guides, and, if necessary, might cue a student to focus by writing down key words from the blackboard and/or whispering in his/her ear. The Child would be one of those 5-6 students.

56. In his self-contained special education writing/resource class at the Herbert Hoover Middle School, the

Child, as part of a group, would receive 45 minutes of reading/writing support each day from a special education teacher. The writing/resource class would have a class size between 6-8 students. All students in that class would have IEPs. The Child would also receive support for his "inclusion model" World Studies, Science and English classes in this setting, the special education teacher in that setting would help the students study for tests and assist them with their homework.

57. During the April 6, 1998 ARD Committing meeting, the Parents expressed concern over the class size proposed for the Child at the Herbert Hoover Middle School. The Parents were informed that MCPS would also be willing to provide the services specified in the April 6, 1998 IEP at the Robert Frost Middle School.

58. The travel time from the Child's home to the Robert Frost Middle School would be approximately ten (10) minutes.

59. The Parents did not sign the portion of the April 6, 1998 IEP listing the goals and objectives of the IEP. The Parents did not agree with the intensity of special education to be provided, the plan of related services, or the placement specified for the Child in the April 6, 1998, IEP. The ARD Committee meeting ended without an agreement between the Parents and MCPS on the 1998-1999 IEP for the Child and the placement for the Child.[4]

[4] On April 9, 1998, the ARD committee sent the Parents a post-meeting letter memorializing its action with respect to the Child's IEP and offered placement.

60. At the end of the April 6, 1998 ARD Committee meeting, the Parents stated that they would have private consultants review the IEP, review the goals and objectives of the IEP, visit the schools to observe the placements offered, and then re-contact MCPS.

61. The special education and related services specified by the April 6, 1998 IEP could be provided for the Child by a placement at the Herbert Hoover Middle School or the Robert Frost Middle School.

62. After the April 6, 1998 ARD Committee meeting, the Parents did not visit the Herbert Hoover Middle School.

63. The Parents set up an appointment to observe the placement offered at the Robert Frost Middle School.

64. On May 1, 1998, the Child's mother visited the Robert Frost Middle School and met with Doris Shiery, a special education teacher at that school. When she came in, the Child's mother told Doris Shiery that she (the Child's mother) was sure the Robert Frost Middle School wouldn't be appropriate. Doris Shiery took the Child's mother on a tour of the school and discussed with her the transition process and the possible placement for the Child at the Robert Frost Middle School.

65. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, the Child would be in self-contained special education classes of 8-12 students for both English and the writing/resource classes. Both classes would be taught by certified special education teachers. Under an "inclusion model" (similar to that at the Herbert Hoover Middle School), the Child would be one of between 28-32 students in his World Studies and

Science classes. The World Studies and Science classes would be co-taught by a certified special education teacher and another teacher (not certified as a special education teacher). The special education certified teacher would sit with and provide special education services to 4-5 students in the class who had IEPs. The Child would be one of those 4-5 students. Just as at the Herbert Hoover Middle School, the Child would be in a regular education class of up to 32 students for Math, Physical Education, and Arts Rotation.

66. The Child's mother, during her visit to the Robert Frost Middle School, had the opportunity to sit in on two "inclusion" classes such as those in which the Child would be placed. She observed the classes and the role of the special education teacher in those classes.

67. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, the .75 hours (45 minutes) of speech-language therapy each week would be provided to the Child in a small group setting. In this small group setting, a speech-language therapist would provide services to a group of 2-5 students.

68. After the visit to the Robert Frost Middle School, the Parents did not re-contact MCPS and request any additional services and/or goals be added to the Child's IEP for the 1998-1999 school year.

69. On May 5, 1998, the Parents sent a letter to the MCPS advising of their intention to place the Child "at the McLean School for the 1998-199[9] school year." (MCPS Exhibit #24) The letter read:

> . . . [W]hat MCPS is proposing for [the Child] . . . would be insufficient to meet his identified needs. More specifically, [the Parents] have decided that the proposed MCPS placement is too large, not structured enough, has insufficient services and does not include required related services. . . .

70. Although MCPS obtained permission from the Parents to contact Ruth B. Spodak, Ph.D. & Associates and Carol A. Kamara, Ph.D. CCC-SP/A [sic], in order to discuss their reports, no one from MCPS did so.

71. The Child has areas of strength and severe weaknesses in his ability to communicate. The Child experiences highly significant difficulty with auditory processing skills.

72. Although individual speech/language therapy had been recommended by Carol Kamara in the report on her speech/language testing of the Child, only group therapy, 45 minutes per week was offered under the April 6, 1998 IEP.

73. The Child is highly distractible, the presence of a special education teacher sitting near the Child in class as in the "inclusion" model proposed by MCPS, is likely to add to his distraction. Because of his distractibility, the "inclusion" model as proposed by MCPS is not appropriate for the child.

74. The Child's learning disability, his distractibility, and his auditory processing skills deficit dictate that he be in small classes for all his academic subjects; large classes are not appropriate for the Child.

75. The long range goals, short term objectives, hours of special education and related services, as listed on the April 6, 1998 IEP, are not reasonably calculated to meet the Child's needs for special education and related services during the 1998-1999 school year. The IEP had no

goals to address the Child's severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem. The IEP did not meet the Child's need for individual speech and language therapy 45-60 minutes per week or, at a minimum, 30 minutes per week if he were to have an additional period of group therapy. From a speech-language perspective, the Child needs an educational setting limited to small classes with a low student to teacher ratio. The IEP fails to require that the Child receive services in small classes for all academic subjects.

76. The Intensity IV special education program offered by MCPS in the Herbert Hoover Middle School is not reasonably calculated to meet the Child's educational needs. Special education and related services provided by the proposed placement in the "inclusion" program at the Herbert Hoover Middle School would not be appropriate and would not provide significant learning for the child. That placement would not meet the requirement that the Child be in small classes in all academic subjects, would not provide individual speech/language therapy, or address the Child's underlying speech/language issues, and the Child would not be amendable to the type of help offered within the "inclusion" classes.

77. The Intensity IV special education program offered by MCPS in the Robert Frost Middle School is not reasonably calculated to meet the Child's educational needs. Special education and related services provided by the proposed placement in the "inclusion" program at the Robert Frost Middle School would not be appropriate and would not provide significant learning for the Child. That placement would not meet the requirement that the Child be in small classes in all academic subjects, would not

provide individual speech/language therapy, or address the Child's underlying speech/language issues, and the Child would not be amendable to the type of help offered within the "inclusion" classes.

78. The special education and related services called for by the April 6, 1998 IEP and the placements offered by MCPS do not provide the Child with an opportunity for a FAPE during the 1998-1999 school year.

79. The McLean School of Maryland on Potomac, Maryland) is not certified by the Maryland State Department of Education as an approved special education facility. The McLean School has a learning disability program that accepts students who do not have severe learning disabilities. If the Child were to attend the McLean School for the 1998-1999 school year, all of his academic classes would be taught by certified special education teachers in class sizes of 6-12 students.

80. Placement of the Child at the McLean School's program for the 1998-1999 school year would be an appropriate placement for his educational needs.

81. The travel time from the Child's home to the McLean School of Maryland would be approximately ten (10) minutes.

82. Because the McLean School of Maryland has a small school environment similar to that at Green Acres, where the Child attended from Pre-Kindergarten, transition to that school would be easier for him than a transition to a larger public school.

DISCUSSION

The Parents in this case contend that the Intensity IV level special education program and placement offered by MCPS at either the Herbert Hoover Middle School or the Robert Frost Middle School for the 1998-1999 school year would not meet the Child's educational needs. The Parents assert that the Child's attendance at the McLean School of Maryland was necessary for him to receive an appropriate education for the 1998-1999 school year.

MCPS maintains, however, that placement of the Child at the Herbert Hoover Middle School or the Robert Frost Middle School would have been appropriate and would have provided him with a FAPE for the school year in question, therefore, it is not their responsibility to fund a placement of the Child at the McLean School of Maryland.

In a decision issued July 9, 1998, the ALJ denied the Parents' request for an order directing placement of the Child at the McLean School of Maryland for the 1998-1999 school year. Given the lapse of time since the original decision was issued, the Parents now claim they are entitled to reimbursement for their unilateral placement of the child at the McLean School of Maryland for the 1998-1999 school year.

Pursuant to the order and opinion, issued by the Honorable Peter J. Messitte in *Brian S. et al. vs. Paul L. Vance, et al.*, Civil No. PJM 99-15, United States District Court (MD), the ALJ conducted a remand proceeding in this case. The findings of fact reached, herein, are based on a reallocation of the burden of proof from the Parents and Child to MCPS. In making these findings of fact, the ALJ reconsidered the findings of fact originally reached

from the perspective of a "snapshot" taken on July 9, 1998, and not from a retrospective perspective.[5]

In their pre-hearing written statements, both parties submitted proposed findings of fact. Insofar as the ALJ

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[5] In this course of action, the ALJ followed the reasoning in *Fuhrmann v. East Hanover Bd. of Education*, 993 F.2d 1031 (concurring opinion) (3rd Cir. 1993).

> Actions of school systems cannot, as the [parents] and the dissent suggest, be judged exclusively in hindsight. As the Court of Appeals for the First Circuit has observed an individualized education program ("IEP") is a snapshot, not a retrospective. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990), *cert. denied*, 499 U.S. 912, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991). In striving for "appropriateness", an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted. *Id.* at 992. Moreover, while [the child's] progress during the 1989-90 school year at the State Street School is impressive, it cannot be ascertained to what extent the behavioral oriented approach offered at the State Street school was responsible for [the child's] progress, or whether [the child's] progress was a result of his own maturation process or other factors.
>
> Addressing the issue of whether or not the 1989-90 program recommended by the East Hanover Board of Education was reasonably calculated to enable [the child] to receive educational benefits, I find that it was. The [parent's] asssertion and the dissent's conclusion to the contrary is based on [the child's] actual experiences at the State Street School which occurred after the school board's placement decision had already been made. The alchemy of "reasonable calculation" necessarily involves choices among educational policies and theories – choices which courts, relatively speaking, are poorly equipped to make. Because I do not think that the district court erred in judging the appropriateness of the school district's offer without giving significant weight to the subsequent experience of the child, I would affirm the judgment under review.

Id. at 1041.

accepts those proposed findings of fact, they are incorporated into the findings of fact, herein. Proposed findings of fact not incorporated are rejected as immaterial, cumulative, or not supported by a preponderance of the credible evidence.

OPPORTUNITY FOR A FAPE

The IDEA was enacted to ensure that children with disabilities are provided with a FAPE to meet their unique needs. 20 U.S.C. §§ 1400-1485 (1997). In relevant part, IDEA defines a FAPE as:

> [S]pecial education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, [and] (D) are provided in conformity with the individualized education program required under Sec. 1414(d) of this title.

Id. at § 1401(8). The educational program offered must be tailored to the particular needs of the disabled student by the development and implementation of an IEP. *Id.* at § 1414(d). That document enumerates the student's current educational performance, sets forth annual and short-term objectives for improvements in performance, and describes the specially designed instruction and services that will assist the student in meeting those objectives. *Id.* at § 1401(11).

In addition, IDEA dictates that each student with disabilities be educated in regular classrooms with non disabled children "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A) and COMAR 13A.05.01.08E(2)(b). Specifically, IDEA directs the states to establish:

> To the maximum extent appropriate, children with disabilities, including children in public or

> private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature of severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id. at 20 U.S.C. § 1412(a)(5)(A).

The U.S. Court of Appeals, 4th Circuit recognized the significance of mainstreaming when it found:

> Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with non handicapped children is not only a laudable goal but is also a requirement of the [IDEA].

Devires v. Fairfax County School Board, 882 F.2d 876, 878 (4th Cir. 1989).

Even in light of the clear congressional preference, the *DeVires* court cautioned that mainstreaming is not appropriate for every disabled student. In issuing that warning, the *DeVires* court relied upon an analysis utilized by the U.S. Court of Appeals, 6th Circuit. That analysis is as follows:

> The proper inquiry is whether a proposed placement is appropriate under the [IDEA]. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement

with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the [IDEA's] mandate. In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the [IDEA]. Framing the issue in this matter accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.

Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 196 (1983).

The Supreme Court in *Board of Educ. of the Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 3049 (1982), interpreted IDEA's broad mandate to be satisfied when a school system provides a student with "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."

A recent case from the U.S. Court of Appeals, 3rd Circuit discusses IDEA's requisite educational benefit:

> IDEA leaves to the courts the task of interpreting "free appropriate public education." See

Rowley, 458 U.S. at 188-89, 102 S.Ct. 3034. The Supreme Court began this task in *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), holding that while an IEP need not maximize the potential of a disabled student, it must provide "meaningful" access to education. *Id.* at 192, 102 S.Ct. 3034, and confer "some educational benefit" upon the child for whom it is designed. *Id.* at 200, 102 S.Ct. 3034. In determining the quantum of educational benefit necessary to satisfy IDEA, the Court explicitly rejected a bright-line rule. Noting that children of different abilities are capable of greatly different achievements, the Court instead adopted an approach that requires a court to consider the potential of the particular disabled student before it. See *id.* at 202, 102 S.Ct. 3034; *see also Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985) (stating that *Rowley* holds that "no single substantive standard can describe how much educational benefit is sufficient to satisfy [IDEA]").

We first interpreted the phrase "free appropriate public education" in *Board of Education v. Diamond*, 808 F.2d 987 (3d Cir. 1986), when we rejected the notion that the provision of any educational benefit satisfies IDEA, holding that IDEA "clearly imposes a higher standard," *Id.* at 991. Examining the quantum of benefit necessary for an IEP to satisfy IDEA, we held in *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), that IDEA "calls for more than a trivial educational benefit" and requires a satisfactory IEP to provide "significant learning." *Id.* at 182, and confer "meaningful benefit." *Id.* at 184. We also rejected the notion that what was "appropriate" could be reduced to

a single standard, *id.*, holding the benefit "must be gauged in relation to the child's potential." *Id.* at 185. When students display considerable intellectual potential, IDEA requires "a great deal more than a negligible [benefit]." *Id.* at 182.

As noted, the District Court held that an IEP need only provide "more than a trivial educational benefit" in order to be appropriate, equating this minimal amount of benefit with a "meaningful educational benefit." But the standard set forth in *Polk* requires "significant learning" and "meaningful benefit." The provision of merely "more than a trivial educational benefit" does not meet these standards.

> It appears also that the District Court may not have given adequate consideration to M.E.'s intellectual potential in arriving in its conclusion that Ridgewood's IEP was appropriate. Although its opinion discussed the IEP in considerable detail, it did not analyze the type and amount of learning of which M.E. is capable. As we have discussed, *Rowley* and *Polk* reject a bright-line rule on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student's individual abilities.

Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 247-248 (3rd Cir. 1999).

Whether or not a student could receive the requisite educational benefit under a proposed IEP and placement is not an easy question to answer. No bright line test has been created to establish whether a student is progressing or could progress educationally. *Conklin v. Anne Arundel County Board of Education*, 946 F.2d 306, 313 (4th Cir.

1991). The task before the ALJ is to asses [sic] the evidence and to determine, in light of the Child's intellectual potential, whether it was more likely than not that the April 6, 1998 IEP and the placement(s) offered for the Child by MCPS were reasonably calculated to enable him to obtain "significant learning" and "meaning educational benefit" during the 1998-1999 school year. In the matter *sub judice*, MCPS bears the burden of persuasion in establishing that the April 6, 1998 IEP and the placement(s) offered for the Child under that IEP afforded the child an opportunity for a FAPE during the 1998-1999 school year.

In order to determine if the Child was afforded an opportunity for a FAPE, the evidence that the ALJ must assess consists – in large part – of expert opinion testimony. Expert opinion testimony is essential in order for each side to present its position on that issue.[6] There are

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[6] As recently noted by the Maryland Court of Appeals in *Wrobleski v. de Lara*, 353 Md. 509, 727 A.2d 930 (1999):

> Although expert witnesses play a vital, indeed a necessary, role in the trial of certain cases, the law, both here and in England has long viewed their procurement by, and appearance on behalf of parties to the litigation with some misgiving. As long ago as 1858, the Supreme Court noted that "opposite opinions of persons professing to be experts, may be obtained to any amount. *Winans v. New York & Erie Railroad*, 62 U.S. (21 How.) 88, 101, 16 L.Ed. 68, 71 (1858). In his 1864 treatise on Evidence, Judge Taylor observed
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> > "Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses*. These gentlemen are usually required to speak, not to facts, but to *opinions*, and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them."

(Continued on following page)

experts on both sides who have testified with opposing points of view. The credentials of all of those experts, in their respective fields, were impressive. Because each side's experts have diverging views on the question of what the Child's needs were and whether the placement(s) offered by MCPS were reasonably calculated to afford the requisite educational benefit for the Child, the re-assignments of the burden of proof in this case is, again, critical to the ALI's decision.

JOHN P. TAYLOR A TREATISE ON THE LAW OF EVIDENCE AS ADMINISTERED IN ENGLAND AND IRELAND 4th ed. (1864), § 50 at 72 (emphasis in original).

Writing in 1893, Professor Charles Himes quoted Taylor's statement and added his own view that expert witnesses "are selected on account of their ability to express a favorable opinion, which, there is great reason to believe, is in many instances the result alone of employment and the bias growing out of it." 135 J. Franklin Inst. at 409 (1893). In an 1897 address to the New Hampshire Medical Society, EXPERT TESTIMONY – PREVALENT COMPLAINTS AND PROPOSED REMEDIES, reprinted in 11 HARV L. REV. 169 (1897), Judge William Foster, though disagreeing with Professor Himes's general inference of bias, nonetheless recognized, even then that "[t]his bias or inclination in favor of the party by whom the witness is employed, is probably the most frequent complaint of all against the expert witness." *Id.* at 171.

These concerns have certainly not dissipated over the years; if anything, they have increased. Wigmore noted the "distrust of the expert witness, as one whose testimony is shaped by his *bias for the party calling him.*" 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 563 at 761 (Chadbourn rev. 1979) (emphasis in original).

Id. at 515-516, 932-933.

The key fact in dispute is whether the Child experiences a "central auditory processing" problem, and if so, the impact of that disability on his ability to learn.

Carol A. Kamara, Ph.D. testified as an expert witness for the Parents. Dr. Kamara was admitted as an expert witness in Speech/Language Pathology and Audiology. Dr. Kamara testified that the Child has an unique problem with "central auditory processing," that the problem is "highly significant" and would impact the Child's learning in all academic settings. According to Dr. Kamara, to address his "central auditory processing" problem, the child's educational needs can only be met in small, self-contained special education classes. Dr. Kamara was critical of the proposed placement in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School because of the risk of simultaneous messages, distractions, and possible distortions of audio signals in that setting. Dr. Kamara further testified that this critical need of the Child – his "central auditory processing" problem – was not addressed in the April 6, 1998 IEP.

Pamala Zahara, Speech/Language Pathologist, Herbert Hoover Middle School (MCPS) testified on behalf of the MCPS. Pamala Zahra was admitted as an expert witness in Speech/Language Pathology. She indicated that, in her opinion, based on an informal assessment that she conducted, that the Child did not exhibit evidence of "severe auditory processing difficulties related to discrimination at the word level" as found by Dr. Kamara.

Dr. Kamara and Pamala Zahara strongly disagree on the usefulness of one formal test of the Child conducted during Dr. Kamara's comprehensive evaluation known as

the "SCAN-A." In her opinion, Dr. Kamara relied heavily on the results of the SCAN-A. However, during cross-examination, Dr. Kamara acknowledged that no test score should be "[translated] directly into a real life situation . . . [t]hese tell us their vulnerability areas. . . . " (T. 473) In her opinion, Pamala Zahara relied heavily on her informal assessment of the Child. However, during cross-examination, Pamala Zahara acknowledged that the SCAN-A is a "formalized standardized objective measure of central auditory processing." (T. 266) However, Pamala Zahara maintains that "this particular test does not give . . . information about a student's real life listening situation." (T. 265) Pamala Zahara contends that the SCAN-A test has no relationship to the student's educational environment because the test is administered with the student using headphones and the noise (and competing messages) heard over the earphones is not typical noise that one would hear in a classroom.

Dr. Kamara is a certified audiologist. Pamala Zahra is a speech/language pathologist. Pamala Zahra is not a certified audiologist. During testimony, Pamala Zahara acknowledged that an audiologist is more qualified to diagnose auditory processing problems than a speech/language pathologist.

Dr. Kamara conducted a formal, comprehensive evaluation of the Child that took four (4) hours to complete Pamala Zahara reviewed the report from Dr. Kamara on her evaluation of the Child and conducted an informal assessment of the Child over a period of one (1) hour. Pamala Zahara found no evidence of "severe auditory processing difficulties related to discrimination at the word level" during her informal assessment and concluded, therefore, that a "central auditory processing"

problem did not exist (or has only an insignificant impact on the Child's learning). Undoubtedly, Dr. Kamara's effort and experience in evaluating the Child was more extensive than that of Pamala Zahara.

In the decision issued July 9, 1998, the ALJ discussed other concerns with the merit of the expert opinion testimony from Dr. Kamara. Those concerns are still present and are incorporated into the discussion, herein, by reference.

In sum, the weight of the evidence from Dr. Kamara and Pamala Zahara on the usefulness of the SCAN-A and the existence of the Child's unique "central auditory processing" problem, rests in equipose [sic]. In resolving this dispute of fact, the ALJ must accept one expert's opinion and reject the other. Unlike the initial hearing, MCPS now bears the burden of proof on facts in dispute. For this reason, the ALJ now accepts the opinion from Dr. Zamara that the child has an unique "central auditory processing" problem and rejects Pamala Zamara's opinion to the contrary. Having reversed the factual finding on that initial point, the ALJ will further accept, the opinion of Dr. Kamara that the Child's unique "central auditory processing" problem has a significant impact on his learning and rejects expert opinion testimony from MCPS to the contrary. (Findings of Fact #16, #71, #73, & #74)

MCPS maintains that its plan of special education and related services reflected in the April 6, 1998 IEP and its proposed placement(s), offered in the alternative, were reasonably calculated to allow the child to obtain "significant learning" and "meaning educational benefit" during the 1998-1999 school year. Linda J. Brand, Special Education Teacher, Barbara J. Butera, School Psychologist,

Pamala Zahra, Speech/Language Pathologist, and Doris Shiery, Special Education Teacher, were the expert witnesses who testified on behalf of MCPS on this theme.

Barbara Butera was admitted as an expert witness in school psychology. Dr. Butera's observation and psychological assessment of the Child were consistent with the assessment of the Child presented in the report on the Child from the office of Ruth B. Spodak, Ph.D & Associates. However, Dr. Butera opined that the April 6, 1998 IEP was appropriate to meet the Child's educational needs and that the Child would obtain significant, measurable benefit during the 1998-1999 school year if he attended the Herbert Hoover Middle School or the Robert Frost Middle School. Dr. Butera also stated that the Child does not need a full-time, self-contained special education program.

Linda J. Brand was admitted as an expert witness in special education. She testified that the special education and related services identified by the April 6, 1998 IEP were appropriate to meet the Child's educational needs, that his IEP could be implemented at the Herbert Hoover Middle School, that his placement there was appropriate, and that the Child would obtain "educational benefit" during the 1998-1999 school year if he attended that school. (T. 133)

Doris Shiery was admitted as an expert witness in special education. She testified that the special education and related services identified by the April 6, 1998 IEP are appropriate to meet the Child's educational needs, that his IEP can be implemented at the Robert Frost Middle School, that his placement there would be appropriate, and that the Child would obtain "educational benefit"

during the 1998-1999 school year if he attended that school. (T. 340-341)

Ruth B. Spodak, Ph.D., testified as an expert witness for the Parents. Dr. Spodak was admitted as an expert witness in psychology and learning disabilities. During her testimony, she opined, consistent with the opinion of Dr. Kamara, that the Child would receive only trivial or minimal educational benefit, not the appropriate benefit, in a placement at either the Herbert Hoover Middle School or the Robert Frost Middle School. Dr. Spodak would not recommend that the Child be provided special education services in an "inclusion model" setting. Dr. Spodak believes that the Child's educational needs can only be met in small, self-contained special education classes. Small, self-contained special education classes in all academic settings are needed to minimize distractions in order for the Child to be available for learning.

MCPS special education experts testified that many of the disabled students in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School have a "profile" similar to the Child's abilities, disabilities and educational needs. MCPS special education experts testified those students with a "similar profile" are successful learning in that setting. This testimony estimates the Child's projected learning in the "inclusion model" setting compared with a group of students with whom the experts are familiar on the basis that the Child has a "similar profile." This may be a valid comparison if the Child's needs are correctly identified and properly considered in such "profiling".

However MCPS experts do not recognize that the Child has an unique central auditory processing problem

that has a significant impact on his learning as described by Dr. Kamara. Resultantly, the ALJ is left to question how similar a profile the Child has to those students who are successful at the Herbert Hoover Middle School or the Robert Frost Middle School. The failure of MCPS experts to accept and take this need of the Child into their consideration is a factor in explaining the merit of their opinions.

Dr. Kamara testified that the April 6, 1998 IEP, as drafted, does not recognize the Child's central auditory processing problem as a need to be addressed in the Child's education. The April 6, 1998 IEP had no goals to address the Child's severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem, as found and described by Dr. Kamara. This testimony was not refuted. Having accepted the position that the Child has an unique central auditory processing deficit, the failure of the IEP to recognize and address that deficit is noteworthy.

According to Dr. Kamara and Dr. Spodak, the Child's learning disability, his distractibility, and his auditory processing skills deficit dictate that he be in small classes for all his academic subjects; large classes are not appropriate for the Child. Moreover, Dr. Spodak and Dr. Kamara insist that a class is not made small for the Child by increasing the teacher/student ratio within a large class. Given the description of the "inclusion setting" in this record, and after accepting the opinion from Dr. Kamara that the Child has an unique central auditory processing problem that has a significant impact on his learning, the ALJ now questions whether the Child could obtain meaningful educational benefit in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School.

The last class the Child attended while at Green Acres School had no more than 13 assigned students and one teacher. The Child received numerous accommodations and additional educational support in that setting. The Child was on a probation status in that educational setting. Despite the small class size accommodations, and additional educational support, the Child was not making satisfactory progress learning in that setting. With one important caveat (the Child was not taught by a certified special education teacher at Green Acres School), this does lend some support, however slight, to the Parents' experts who maintain that the Child needs small self-contained special education classes if he is to obtain significant learning.

In the decision issued July 9, 1998, the ALJ discussed other concerns with the merit of the expert opinion testimony from Dr. Spodak. Those concerns are still present and are incorporated into the discussion, herein, by reference.

In sum, the weight of the evidence from the Parents' experts and the experts on behalf of MCPS on the degree of "educational benefit" that the Child could have obtained under the April 6, 1998 IEP, in the "inclusion" setting at either the Herbert Hoover Middle School or the Robert Frost Middle School rests in equipose. In resolving this dispute, the ALJ must accept the opinion from one side's experts and reject the other. Unlike the initial hearing, MCPS now bears the burden of proof on facts in dispute. For this reason, the ALJ now accepts the opinions from Dr. Kamara and Dr. Spodak that the Child – given his potential for learning – would not have obtained meaningful educational benefit under the April 6, 1998 IEP in a

placement at either the Herbert Hoover Middle School or the Robert Frost Middle School.

Given the findings of fact, herein, MCPS has failed to persuade the ALJ that the April 6, 1998 IEP was reasonably calculated to provide "significant learning" and "meaning educational benefit" and the placement(s) offered by MCPS were appropriate to provide for the Child's educational needs in accordance with the IDEA.

REIMBURSEMENT

In cases where a public education agency has not offered a FAPE and the parents have placed their child in a private program that does provide an appropriate education, the parents are entitled to be reimbursed by the public education agency for the placement. *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996 (1985). The unilateral placement need not be in a program approved by the State. And, while the private school must offer an appropriate education, it is not required to follow all of IDEA's procedural requirements or meet all state special education standards. *Carter v. Florence County School District*, 950 F.2d 156 (4th Cir. 1991), *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993). As discussed above, an ALJ may "order school authorities to reimburse parents for their expenditures on private special education for a child if [the ALJ] ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *Florence*, 510 U.S. at 14, 114 S.Ct. at 364 (quoting *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359,

369, 105 S.Ct. 1996, 2002 (1985)). Such reimbursement is appropriate, however, only to the extent that the cost of the private education was reasonable. *Id.* at 17 at 366.

The April 6, 1998 IEP and placement(s) offered by MCPS failed to afford the Child an opportunity for a FAPE for the 1998-1999 school year. After the evidentiary record in this case was closed, the Parents placed the child at the McLean School of Maryland for the 1998-1999 school year. The record reflects that the McLean School of Maryland would provide the child with small classes taught by special educators for all of his academic subjects. It offers a setting and program appropriate to his needs. The McLean School of Maryland provides the Child with an appropriate educational opportunity for the 1998-1999 school year that he would not otherwise receive from MCPS.

However, reimbursement is an equitable form of relief. *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993). MCPS argues that it was never the intention on part of the Parents to have the Child enroll as one of its students, and since it put forth a good faith effort to develop an IEP for the 1998-1999 school year, equity requires that the Parents be denied reimbursement. MCPS relies on, among other authorities, *Tucker [illegible] Tucker v. Calloway County Board of Education*, 136 F.3d 495 (6th Cir. 1998) and *Sanger v. Montgomery County Board of Education*, 916 F. Supp. 518 (D. Md. 1996). *Tucker* and *Sanger* are cases in which reimbursement to parents for the unilateral placement of a student with disabilities in a private school was denied. In both cases

cited, the parents enrolled the student with disabilities in a private school setting before an IEP could be developed by the local education agency. The holdings in those cases reflect that no financial assistance is warranted for the private placement, where a lack of intention by parents to avail themselves of a public school education for their student with disabilities, no matter what program was developed nor how appropriate it was to respond to the student's needs, is revealed.

The Child had been educated from pre-kindergarten through seven as a student at the Green Acres School, a private school. The Child's mother had worked for three years as an administrator at that school, as the assistant to the head of the Green Acres School. On November 7, 1997, the Child's mother contacted MCPS in order to have the Child identified as a student with disabilities under IDEA. On that date, the Child's mother indicated to a MCPS teacher that she had to find another *private* school for the Child to attend. During December 1997, the Parents were in contact with the McLean School of Maryland and another private school. On December 30, 1997, the child, through his Parents, applied for admission to the McLean School of Maryland. On or about March 1, 1998, the Parents were notified by the McLean School of Maryland that the Child had been accepted as a student in the 8th Grade for the 1998-1999 school year. The Parents had also applied to the Lab School for admission of the Child as a student for the 1998-1999 school year and that application was also accepted. On March 13, 1998, MCPS sent notice of the second ARD committee meeting to the Parents. By March 16, 1999, the Parents had paid a non-refundable $750.00 enrollment fee to the McLean School of Maryland to guarantee placement of the child at the

school for the 1998-1999 school year. At the time the Parents paid a non-refundable $750.00 enrollment fee to the McLean School of Maryland, the Parents knew that the ARD committee meeting that was to prepare an IEP and determine a placement for the Child for the 1998-1999 school year had not yet taken place. The Parents and their attorney attended the April 6, 1998 ARD Committee meeting.

Before the April 6, 1998 ARD Committee meeting, the Parents had already enrolled the Child at the McLean School of Maryland for the 1998-1999 school year. At the April 6, 1998 ARD Committee meeting, the Parents indicated that they would review the goals and objectives of the IEP, have private consultants review the IEP, visit the schools to observe the placements offered, and then re-contact MCPS. The Parents did not visit the Herbert Hoover Middle School. On May 1, 1998, the Child's mother visited the Robert Frost Middle School and met with Doris Shiery, a special education teacher at the school. When she came in, the Child's mother told Doris Shiery that she (the Child's mother) was sure the Robert Frost Middle School wouldn't be appropriate. The Parents did not recontact MCS and request any additional services and or goals be added to the Child's IEP for the 1998-1999 school year.

These events strongly suggests a design by the Parents to simply obtain funding from MCPS for a predetermined decision to have the Child attend private school. The Child's mother testified that as of March 16, 1998, "there was a chance" that the Child would end up attending public school for the 1998-1999 school year. (T. 570) Despite the testimony, the ALJ believes it more likely than not that the child would be attending the McLean

School of Maryland for the upcoming school year no matter what IEP was developed and public school placement was offered at the April 6, 1998 ARD Committee meeting. The Parents did not approach their interaction with MCPS as a partnership in educating the Child as a student with disabilities. The Parents may have followed the letter of their obligations under the IDEA, however, their activities are inconsistent with the congressional intent behind that statute.[7]

The Parents contend that they are seeking only what they are entitled to under the IDEA. Under IDEA, the parents and the local education agency should be equal partners in educating a student with disabilities. As a matter of equity, therefore, the ALJ will create a partnership between the Parents and MCPS for funding placement of the Child at the McLean School of Maryland for the 1998-1999 school year.

[7] The conduct of MCPS experts also leaves much to be desired. MSPC experts failed to develop an IEP that was reasonably calculated to provide the Child with "significant learning" and "meaning educational benefit." The Parents' experts had evaluated the Child and provided reports of those evaluations. Those reports were provided to MCPS. The independent assessments of the Child were extensively reviewed and considered by MCPS experts. An MCPS expert accepted the independent psycho-educational evaluation of the Child but rejected the educational setting recommended. An MCPS expert accepted, in-part, the independent speech-language assessment of the Child but rejected the educational setting recommended. MCPS experts made no effort to contact the Parents' experts and discuss those reports and recommendations. Lack of contact by MCPS experts with the Parents experts may have played a role in the failure by MCPS to develop an IEP appropriate to the Child's educational needs and offer an appropriate placement.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact and discussion, the ALJ concludes, as a matter of law that the April 6, 1998 IEP was not reasonably calculated to provide "significant learning" and "meaning educational benefit" and the placement(s) offered by MCPS were not appropriate and failed to afford the Child an opportunity for a FAPE for the 1998-1999 school year as required by IDEA, 20 U.S.C. § 1400(c) (1997); Md. Code. Ann., Educ. § 8-413 (1997).

Based upon the foregoing findings of fact and discussion, the ALJ concludes, as a matter of law that the Parents are entitled to reimbursement for one half of the Child's unilateral placement at the McLean School of Maryland during the 1998-1999 school year. *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996 (1985) *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993).

ORDER

IT IS ORDERED THEREFORE, that the Parents' request for an order directing placement of the Child at the McLean School of Maryland for the 1998-1999 school year be, and hereby is, GRANTED; and

IT IS FURTHER ORDERED, that the Parents shall be REIMBURSED by MCPS for one half of the cost of placement of the Child at the McLean School of Maryland for the 1998-1999 school year.

November 27, 2000
Date

/s/ S. J. Nichol
Stephen J. Nichols
Administrative Law Judge

APPEAL RIGHTS

Any party aggrieved by this Final Decision of the Maryland State Department of Education may appeal it by filing a petition for judicial review with the circuit court for the county where the child resides or the United States District Court for Maryland, without regard to the amount in controversy, within one hundred eighty (180) days after the date that notice of the decision is sent Md. Code. Ann. [Illegible], 1999).

APPENDIX

The following documents were admitted on behalf of MCPS:

MCPS = 1 – Parent Interview Questionnaire.

MCPS = 2 – Educational history with attachments.

MCPS = 3 – Speech/Language Assessment, dated December 9, 1997.

MCPS = 4 – Secondary teacher referral/reports.

MCPS = 5 – Classroom observation, dated December 17, 1997.

MCPS = 6 – Correspondence to David Cross from Holly Parker, dated December 24, 1997.

MCPS = 7 – Psycho-Educational evaluation, dated January 1998.

MCPS = 8 – Correspondence to Parents from Mary Lee Phelps, dated January 7, 1998.

MCPS = 9 – Correspondence to Parents from Caroline Kursman, dated January 14, 1998.

MCPS = 10 – Correspondence to Caroline Kursman from Holly Parker, dated February 17, 1998.

MCPS = 11 – Special needs consultation, dated February 19, 1998.

MCPS = 12 – Classroom observation, dated February 19, 1998.

MCPS = 13 – Green Acres School record summary.

MCPS = 14 – Student screening profile worksheet.

MCPS = 15 – Correspondence with attachments to Parent from Caroline Kursman, dated February 26, 1998.

MCPS = 16 – Correspondence to Linda Brand from Holly Parker, dated March 5, 1998.

MCPS = 17 – Psychological evaluation review, dated March 12, 1998.

MCPS = 18 – Correspondence to Parents from Caroline Kursman, dated March 13, 1998.

MCPS = 19 – Correspondence to Caroline Kursman from Holly Parker, dated March 13, 1998.

MCPS = 20 – Speech language assessment review, dated March 13, 1998.

MCPS = 21 – Educational assessment report review, dated March 15, 1998.

MCPS = 22 – Occupational therapy evaluation, dated March 18, 1998.

MCPS = 23 – Correspondence to Parents from Caroline Kursman, dated April 9, 1998, with attached 1998-99 IEP.

MCPS = 24 – Correspondence to Raymond Bryant from Holly Parker, dated May 5, 1998.

MCPS = 25 – Request for due process hearing, dated May 26, 1998.

MCPS = 26 – Correspondence to Holly Parker from Zvi Greismann, dated May 28, 1998.

MCPS = 27 – Brand chronology.

MCPS = 28 – Thayer chronology.

MCPS = 29 – Subpoena Duces Tecum to the Custodian of Records of the McLean School.

MCPS = 30 – Application for admission to the McLean School, dated December 30, 1997.

MCPS = 31 – Progress report from the Green Acres School, dated June 1998.

MCPS = 32 – Authorization of release of confidential information, dated December 19, 1997.

MCPS = 33 – Letter of acceptance from The McLean School, dated March 1,1998.

The following documents were admitted on behalf of the Parents:

Parent = 1 – Request from mediation due process hearing, dated May 26, 1998.

Parent = 2 – Correspondence to Raymond Bryant from Holly Parker, dated May 5, 1998.

Parent = 3 – Special needs consultation, dated February 19, 1998.

Parent = 4 – Psycho-Educational evaluation, dated January 1998.

Parent = 5 – Speech/language assessment, dated December 9, 1997.

Parent = 6 – Report cards for grades 6th and 7th.

Parent = 7 – Correspondence and progress report to Parents from Green Acres School sixth grade team, dated May 27, 1997.

Parent = 8 – Neuropsychological evaluation, dated January 24 & 26, 1995.

Parent = 9 – Psychological evaluation, dated August 24, 1991.

Parent = 10 – Speech/language progress evaluation report, dated September & October 1990.

Parent = 11 – Speech/language re-evaluation, dated March 15, 1989.

Parent = 12 – Speech/language evaluation, dated August 5, 1998.

Parent = 13 – Occupational therapy evaluation, dated August 4, 1988.

Parent = 14 – Speech/language therapy progress report, dated August 1988.

Parent = 15 – Speech/language therapy progress report, dated June 22, 1997.

Parent = 16 – Correspondence to Parents from Nan Shapiro, dated May 5, 1998.

Parent = 17 – Comprehensive testing program report.

Parent = 18 – Review of assessment, dated March 1998.

Parent = 19 – List of SLP issues.

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS, JOCELYN AND MARTIN SCHAFFER, AND AS HIS NEXT FRIEND	* BEFORE STEPHEN J. * NICHOLS ADMINIS- * TRATIVE LAW JUDGE * OF THE MARYLAND * OFFICE OF ADMINIS- * TRATIVE HEARINGS
VS.	* #98-MSDE-MONT-OT- * 016662
MONTGOMERY COUNTY PUBLIC SCHOOLS	* *

* *

DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER
APPEAL RIGHTS
APPENDIX

STATEMENT OF THE CASE

This case arises from a request by Jocelyn S. Schaffer and Martin P . Schaffer ("Parents"), the mother and father, respectively, of Brian Schaffer ("Child"), for a hearing to review the provision of a free appropriate public education ("FAPE") for the Child as a student with disabilities. The local education agency responsible for providing the Child a FAPE is the Montgomery

County Public Schools ("MCPS"). On May 26, 2998, the Parents filed this request with the MCPS.[1]

Pursuant to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(c) (1997), 34 C.F.R. § 300.510 (1996), Md. Code Ann., Educ. § 8-413 (1997), and the Maryland State Department of Education Guidelines for Maryland Special Education Mediation/Due Process Hearings, the above-captioned case was heard over a period of three days (June 16, 1998, June 23, 1998, & July 2, 1998) before Stephen J. Nichols, Administrative Law Judge ("ALJ"), Office of Administrative Hearings ("OAH"). The hearing was conducted at the offices of the MCPS, 850 Hungerford Drive, Rockville, Maryland. The record closed on July 2, 1998.[2]

Michael J. Eig, Esquire, Bogin and Eig, P.C., represented the Parents and the Child. Edmund W. Law, Esquire, represented the MCPS.

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[1] In pertinent part, the Request For Due Process Hearing reads:

"[The Child] is a student in Montgomery County, Maryland. At issue is whether the placement recommended by MCPS for the 1998-1999 school year at Hoover Middle School is appropriate, and if not, whether the placement at the McLean School is appropriate. Parents have duly notified MCPS of their intention to enroll [the Child] at the McLean School and have informed them of their disagreement with the proposed program. The placement at Hoover is too large, not structured enough, has insufficient services and does not include required related services. Additionally, we are in disagreement with the [i]ntensity of service proposed and do not believe it complies with COMAR requirements. The IEP is also at issue as we do not believe MCPS has identified [the Child's] complete disability and have not signed the IEP. . . ."

[2] A letter (facsimile and original) dated July 6, 1998, was subsequently received at the OAH from the representative for MCPS. That letter, with attachments, is not part of the record, herein, and was not considered in entering the instant decision.

Procedure in this case is governed by the "contested cases" provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1995 & Supp. 1997) and the Rules of Procedure of the Office of Administrative Hearings, Code of Maryland Regulations ("COMAR") 28.02.01.

ISSUES

Whether the Individual Education Program ("IEP") prepared for the Child by the MCPS, and the placement(s) for the Child offered by MCPS, affords the Child an opportunity for a FAPE for the 1998-1999 school year.[2]

Whether placement of the Child at the McLean School of Maryland would provide the Child with a FAPE in the least restrictive environment ("LRE") possible for the 1998-1999 school year.[3]

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[2] An IEP is a "blueprint" for assisting a student with special education needs. Its development requires evaluation of the disabled student's present level of performance and his unique needs for special education and any related services. The IEP is to be reviewed annually by school officials and the student's parents or guardians and revised as needed. 20 U.S.C. § 1414(d) (1997).

[3] COMAR 13A.05.01.02B(3) provides:

(3) "Least restrictive environment" means that:

(a) To the maximum extent appropriate, students with disabilities, including students in public and private institutions or other care facilities, are educated with students who are not disabled; and

(b) Special classes, separate schooling, or other removal of students with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.

SUMMARY OF THE EVIDENCE

EXHIBITS:

MCPS submitted thirty-three (33) documents which were admitted into the record as exhibits. The Parents submitted nineteen (19) documents which were admitted into the record as exhibits. The parties stipulated to the admission of the majority of each others exhibits. Many of the exhibits admitted on behalf of each party are duplicated in the exhibits of the opposing party. A complete list of the exhibits that were admitted is found in the appendix to this decision.

WITNESSES:

Caroline MacNichol, Custodian of Records, McLean School of Maryland; Linda J. Brand, Special Education Teacher, Herbert Hoover Middle School, MCPS; Barbara J. Butera, School Psychologist, MCPS; Pamala Zahra, Speech/Language Pathologist, Herbert Hoover Middle School, MCPS; Doris Shiery, Special Education Teacher, Robert Frost Middle School, MCPS; and Vickie Strange-Moscoso, Special Education Supervisor, MCPS, testified on behalf of the local education agency.

Linda J. Brand was admitted as an expert witness in special education. Barbara J. Butera was admitted as an expert witness in school psychology. Pamala Zahra was admitted as an expert witness in Speech/Language Pathology. Doris Shiery was admitted as an expert witness in special education.

Ruth B. Spodak, Ph.D., Ruth B. Spodak, Ph.D., & Associates; Carol A. Kamara, Ph.D, CCC-SLP/A, The Kamara Center; Nancy Shapiro, Head of the Middle

School, Green Acres School; and the Child's mother testified on behalf of the Parents and the Child.

Ruth B. Spodak was admitted as an expert witness in psychology and learning disabilities. Carol A. Kamara was admitted as an expert witness in Speech/Language Pathology and Audiology.

FINDINGS OF FACT

1. The Child's date of birth was May 13, 1984.

2. The Child has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and has been receiving medication for this diagnosis. Since Spring 1997, the Child has been taking Wellbutrin.

3. The Child has attended Green Acres School since pre-kindergarten. The Green Acres School is not part of the MCPS. The Green Acres School is a private school. While at Green Acres School, the Child was not identified as a student with disabilities. The Green Acres School does not have a special education program. The travel time from the Child's home to the Green Acres School is approximately ten (10) minutes.

4. While attending the 5th Grade and the 6th Grade at the Green Acres School, the Child demonstrated difficulty with productivity and quality of classwork.

5. Because of his prior academic performance, during the 1997-1998 school year, the Child attended the Green Acres School at the part of its 7th Grade class on a probationary status.

6. During the 1997-1998 school year, the Child was in a regular education class with a student to teacher ratio

of 13:1. The Child experienced difficulty with writing and reading tasks. Classwork productivity was a significant problem. The Child had difficulty staying on task.

7. During October 1997, at a meeting with Green Acres School staff personnel, the Child's mother was told that the Child needed a placement, for the next school year, in a school designed to address his learning difficulties.

8. During the 1997-1998 school year, the Child was receiving instructional, classroom and testing accommodations because of his learning difficulties. Accommodations for the Child at the Green Acres School included individual attention from classroom teachers, a peer buddy to ask for clarification of direction, priority seating, working with a tutor 3 times per week, reading support, extra time on class assignments and standardized tests, tutor rewriting of essay questions on his tests to multiple choice or short answer, and exclusion of Spanish class from his educational program.

9. During the 1997-1998 school year, the Child's teachers/tutor at the Green Acres School did not include a person qualified as a special education teacher.

10. At the Green Acres School, the Child received a passing grade in all his subjects for the third trimester of the 1997-1998 school year.

11. The Herbert Hoover Middle School is part of the MCPS system.

12. On November 7, 1997, the Child's mother telephoned the Herbert Hoover Middle School and spoke with Linda Brand, a MCPS special education teacher. The Child's mother indicated she wanted the Child assessed

for identification as a student with disabilities. During this phone conversation, the Child's mother stated that she had to find another private school for the Child to attend.

13. On November 11, 1997, the Child's mother contacted the office of Carol A. Kamara, Ph.D, CCC-SLP/A, an independent speech language pathologist/ audiologist, for the purpose of arranging for a communication assessment of the Child.

14. On December 9, 1997, Carol A. Kamara conducted a comprehensive speech and language assessment of the Child employing a variety of formal and informal measurements. The assessment took 3-4 hours.

15. After the December 9, 1997 assessment, Carol A. Kamara produced a written report. The written report reads, "[the Child's] auditory processing of words was so severely impaired by discrimination issues that his ability to execute any auditory tasks should be considered possibly compromised by this one feature." The written report also reads, that the Child's oral motor evaluation "pattern suggested some "articulation dyspraxia". . . . The report recommends, "[the Child's] serious needs in reading, writing, spelling, and probably math, indicate that he should be placed in a self-contained, full-day special education program. (MCPS Exhibit #3)

16. On December 19, 1997, the Child's mother provided the Green Acres School with an "Authorization for Release Of Confidential Information" in order that the Child's academic records could be sent to the McLean School. The McLean School of Maryland is a private school. (MCPS Exhibit #32)

17. On December 30, 1997, the Parents submitted an application for admission of the Child as a student in the 8th Grade at the McLean School of Maryland for the 1998-1999 school year.

18. During December 1997, the Parents met with Ruth B. Spodak, Ph.D., a psychologist, at the offices of Ruth B. Spodak, Ph.D. & Associates, for the purpose of arranging for an independent psycho-educational evaluation of the Child.

19. On January 5, 1998 and January 6, 1998, Diane Toby, Ph.D., psychologist, and Deanna Greenstein, Ph.D., a psychology associate, conducted a psycho-educational evaluation of the Child at the offices of Ruth B. Spodak, Ph.D. & Associates. The evaluation included a review of records, information obtained from the Parents, formal testing, and behavioral observations of the Child.

20. After the evaluation of the Child, Ruth E. Spodak, Diane Toby, and Deanna Greenstein produced a written report. The report discussed the social/emotional functioning, potential for academic achievement, and cognitive abilities of the Child. The report indicated that the Child was bright and intelligent. The report indicated that because of the Child's learning difficulties, his cognitive test results (in the average range of intelligence) underestimated his true abilities. An excerpt from the report reads, "[the Child] will do best in a small, structured setting, where expectations are clear and consistent." (MCPS Exhibit #7)

21. On January 14, 1998, MCPS sent a letter to the Parents advising that a "screening [Admission, Review, and Dismissal ("ARD") committee] meeting" had been scheduled by MCPS at the Herbert Hoover Middle School

on January 29, 1998. The purpose of this meeting was, "to discuss [the Child's] educational needs, determine whether an educational disability is suspected, and determine follow-up assessment as needed." (MCPS Exhibit #9)

22. The ARD committee meeting scheduled for January 29, 1998, was rescheduled at the request of the Parents. The attorney for the Parents had a schedule conflict on January 29, 1998.

23. On February 26, 1998, a meeting of the ARD committee at the Herbert Hoover Middle School was held. Those attending the meeting included, among others, the Parents; an attorney for MCPS; Caroline Kursman, Principal, Herbert Hoover Middle School; Jeff Hiill, Assistant Principal, Herbert Hoover Middle School; Linda Brand, special education teacher, Herbert Hoover Middle School; Nancy Shapiro, Head of the Middle School, the Green Acres School; Barbara Butera, School Psychologist, MCPS; and Pamala Zahra, Speech/Language Pathologist, Herbert Hoover Middle School.

24. The Parents fully participated in the ARD committee meeting held on February 26, 1998.

25. Test results, teach referrals, observation reports, a parent questionnaire, and educational records of the Child were reviewed by the ARD committee before the February 26, 1998 meeting. These documents included, but were not limited to, an observation report from Nancy Shapiro, Head, Middle School, the Green Acres School; a report from Charla Levine, Special Needs Consultant, the Green Acres School; Narrative Report Cards on the Child from the Green Acres School; an observation report of the Child at the Green Acres School from Linda Brand; and

reports of private assessments of the Child (from Ruth B. Spodak, Ph.D., and Carol A. Kamara, Ph.D, CCC-SLP/A).

26. At the February 26, 1998 ARD committee meeting, the educational history of the Child was discussed. As a result of the meeting, the ARD committee "[suspected] [the Child] may have a [speech-language] disability, and/or learning disability in [areas] of reading [and/or] writing." (MCPS Exhibit #15)

27. The ARD committee decided to further review the private assessments of the Child (from Ruth B. Spodak, Ph.D., and Carol A. Kamara, Ph.D, CCC-SLP/A) that were provided to the committee, to conduct informal assessments of the Child, and to reconvene to evaluate the Child's needs in conjunction with all data.

28. At the end of the February 26, 1998 ARD committee meeting, the Parents were told that the next meeting of the ARD would be an evaluation meeting to determine if the Child met the criteria for special education services as a student with a disability.

29. At the end of the February 26, 1998 ARD committee meeting, MCPS obtained permission from the Parents to conduct its own assessments of the Child, to contact Ruth B. Spodak, Ph.D., and Carol A. Kamara, Ph.D, CCC-SLP/A (in order to discuss their reports), and to contact the child's teachers and tutor at the Green Acres School (to gain information on the Child).

30. On or about March 1, 1998, the Parents were notified by the McLean School of Maryland that the Child had been accepted as a student in the 8th Grade for the 1998-1999 school year. By March 16, 1998, the Parents had paid a non-refundable $750.00 enrollment fee to the

McLean School of Maryland to guarantee placement of the Child at the school for the 1998-1999 school year.

31. Select MCPS members of the February 26, 1998 ARD committee were assigned to review the private assessments of the Child from the perspective of their expertise, conduct further informal assessments of the Child as indicated, and to make a report to the next ARD committee meeting.

32. Linda Brand reviewed the reports of the private assessments of the Child (from Ruth B. Spodak, Ph.D., and Carol A. Kamara, Ph.D, CCC-SLP/A).

33. On March 12, 1998, Linda Brand met with the child at the Herbert Hoover Middle School. During this meeting, Linda Brand administered the Reading Comprehension test of the Wechsler Individual Test of Achievement and the Qualitative Reading Inventory to the Child and conducted an informal assessment of the Child's needs for special education services.

34. Linda J. Brand prepared goals and objectives for the Child's IEP that incorporated the needs, from the special education perspective, identified in the reports of the assessments of the Child from Ruth E. Spodak, Ph.D., and Carol A. Kamara, Ph.D, CCC-SLP/A.

35. Pamala Zahra reviewed the report of the private assessment of the Child conducted by Carol A. Kamara, Ph.D, CCC-SLP/A.

36. On March 12, 1998, Pamala Zahra met with the Child at the Herbert Hoover Middle School and conducted an informal assessment of the Child over a period of one hour. This informal assessment included, among other activities, several tasks designed to informally assess the

Child's phonological processing skills and the administration of one subtest, Understanding Ambiguous Sentences, from the Test of Language Competence.

37. Pamala Zahra disagreed with some of the Child's needs identified in the report of the assessment conducted by Carol A. Kamara. Pamala Zahra did not agree that the Child had "severe auditory processing difficulties related to discrimination at the word level," and "articulation dyspraxia." (MCPS Exhibit #20)

38. Pamala Zahra prepared goals and objectives for the Child's IEP that incorporated the needs, from the speech-language perspective, identified in the report of the assessment from Carol A. Kamara, with which she had agreed.

39. Barbara Butera reviewed the report of the psycho-educational evaluation of the Child from Ruth B. Spodak, Ph.D.

40. On March 12, 1998, Barbara Butera met with the child at the Herbert Hoover Middle School. During this meeting, Barbara Butera interviewed the Child, administered the Behavior Assessment System for Children (BASC) to the Child, and observed the Child's interaction with Linda Brand and Pamala Zahra.

41. Barbara Butera's observation and psychological assessment of the Child on March 12, 1998, was consistent with the assessment of the Child presented in the report on the Child from Ruth B. Spodak, Ph.D.

42. On March 13, 1998, MCPS sent a letter to the Parents advising that an ARD meeting had been scheduled by MCPS for March 26, 1998. The notice also offered an alternate date of April 6, 1998, for the meeting. The

purpose of this meeting was, "to determine the answers to the following questions:" (MCPS Exhibit #18)

> 1. Does the assessment indicate the presence of a disability?
>
> 2. Is [the Child] educationally disabled? . . .
>
> 3. If there is an educational disability, what are the goals and objectives for the Child's [IEP]?
>
> 4. What amount of special education and related service is necessary to meet [the Child's] goals and objectives in the least restrictive environment (LRE)?
>
> 5. What is the appropriate placement to meet the identified goals and objectives?

43. On April 6, 1998, the MCPS held a second ARD committee meeting on the Child. Those attending the meeting included, among others, the Parents, an attorney for the Parents, an attorney for MCPS, Caroline Kursman, Jeff Hill, Linda Brand, Barbara Butera, and Pamala Zahra.

44. The April 6, 1998 ARD committee received and considered reports provided by Linda Brand, Barbara Butera, and Pamaln Zahra on the Child (and on the private assessments of the Child from Carol A. Kamara, Ph.D., CCC-SLP/A, and Ruth B. Spodak, Ph.D.).

45. The Parents fully participated in the ARD committee meeting held on April 6, 1998.

46. At the April 6, 1998 meeting, the ARD Committee reviewed available information, discussed the Child's need for special education and related services, and drafted an IEP for the Child for the 1998-1999 school year.

47. On April 6, 1998, the ARD Committee identified the Child as a student with a speech-language disability and a learning disability.

48. The April 6, 1998 IEP specified an Intensity IV special education program for the Child with 15.3 hours of special education and .75 hours (45 minutes) of speech-language therapy as a related service each week.[4] The special education services would be provided in an "inclusion model" setting during the Child's World Studies, Science and English classes. The Child was to be in a regular education class for Math, Physical Education, and Arts Rotation. The Child was also to receive one period (45 minutes) of reading/writing support each day in a self-contained special education writing/resource class in lieu of the requirement of a class in foreign language.[5]

49. Supplementary aids and services specified in the Child's April 6, 1998 IEP included preferential seating in class, repetition of direction, use of a computer, testing modifications, and copies of notes (as needed).

50. The April 6, 1998 IEP proposed a placement for the Child at the Herbert Hoover Middle School.

51. The Herbert Hoover Middle School was the "home school" for the Child. A "home school" is the school

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[4] "An intensity of service is indicated by the number of hours a service is provided to a student with a disability. Intensities of service also establish caseloads or class size for the professionals who provide these services." COMAR 13A.05.01.10A(1). Intensity IV is defined at COMAR 13A.05.01.10E(5).

[5] On April 9, 1998, the ARD committee sent the Parents a post-meeting letter memorializing its action with respect to the Child's IEP and offered placement.

within MCPS that a student would normally attend if the student was not a student with disabilities. The travel time from the Child's home to the Herbert Hoover Middle School would be approximately six (6) minutes.

52. At the Herbert Hoover Middle School, the .75 hours (45 minutes) of speech-language therapy each week would be provided to the Child in a small group setting. In this small group setting, a speech-language therapist would provide services to a group of 2-5 students.

53. Under the "inclusion model" at the Herbert Hoover Middle School, the Child would be in a class of between 24-28 students in his World Studies, Science and English classes. Those classes would be co-taught by a certified special education teacher and another teacher (not certified as a special education teacher). The special education certified teacher would focus on and provide special education services to 5-6 students in the class who had IEPs. The Child would be one of those 5-6 students.

54. In his self-contained special education writing/ resource class at the Herbert Hoover Middle School, the Child would receive 45 minutes of intensive reading/ writing support each day from a special education teacher. The Child would also receive study support for his other academic classes in this setting. The writing/resource class would have a class size between 6-8 students. All students in that class would have IEPs.

55. During the April 6, 1998 ARD Committee meeting, the Parents expressed concern over the class size proposed for the Child at the Herbert Hoover Middle School. The Parents were informed that MCPS would be willing to provide the services specified in the April 6,

1998 IEP at the Robert Frost Middle School where there were smaller self-contained special education classes.

56. The travel time from the Child's home to the Robert Frost Middle School would be approximately ten (10) minutes.

57. The Parents did not sign the portion of the April 6, 1998 IEP listing the goals and objectives of the IEP. The Parents did not agree with the intensity of special education to be provided, the plan of related services, or the placement specified for the Child in the April 6, 1998 IEP. The ARD Committee meeting ended without an agreement between the Parents and MCPS on the 1998-1999 IEP for the Child and the placement for the Child.

58. At the end of the April 6, 1998 ARD Committee meeting, the Parents stated that they would review the goals and objectives of the IEP, have private consultants review the IEP, visit the schools to observe the placements offered, and then re-contract MCPS.

59. The Parents did not visit the Herbert Hoover Middle School.

60. The Parents set up an appointment to observe the placement offered at the Robert Frost Middle School.

61. On May 1, 1998, the Child's mother visited the Robert Frost Middle School and met with Doris Shiery, a special education teacher at that school. Doris Shiery took the Child's mother on a tour of the school and discussed with her the transition process and the possible placement for the Child at the Robert Frost Middle School.

62. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, special

education services would be provided for the Child in his World Studies and Science classes under an "inclusion model." The World Studies and Science classes that the Child would attend would have a class size of between 28-30 students. Those classes would be co-taught by a certified special education teacher and another teacher (not certified as a special education teacher). The special education certified teacher would focus on and provide special education services to 4 students in the class who had IEPs. The Child would be one of those 4 students.

63. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, the Child's English and writing/resource classes would both be taught in a self-contained special education environment. The class size would be between 8-12 students. All students would have IEPs. Both classes would be taught by certified special education teachers.

64. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, the Child would be in a regular education class for Math, Physical Education, and Arts Rotation.

65. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, the .75 hours (45 minutes) of speech-language therapy each week would be provided to the Child in a small group setting. In this small group setting, a speech-language therapist would provide services to a group of 2-5 students.

66. On May 5, 1998, the Parents sent a letter to the MCPS advising of their intention to place the Child "at the McLean School for the 1998-199[9] school year." (MCPS Exhibit #24) The letter read:

> . . . [W]hat MCPS is proposing for [the Child] . . . would be insufficient to meet his identified needs. More specifically, [the Parents] have decided that the proposed MCPS placement is too large, not structured enough, has insufficient services and does not include required related services. . . .

67. The McLean School of Maryland (in Potomac, Maryland) is not certified by the Maryland State Department of Education as an approved special education facility. The McLean School has a learning disability program that accepts students who do not have severe learning disabilities. If the Child were to attend the McLean School for the 1998-1999 school year, his classes would be taught by certified special education teachers in class sizes of 6-12 students.

68. The Child has areas of strengths and weaknesses in his ability to communicate. The Child experiences moderate difficulty with auditory processing skills. Overall, the Child has a mild speech-language disability.

69. The long range goals, short term objectives, hours of special education and related services, as listed on the April 6, 1998 IEP, are reasonably calculated to meet the Child's needs for special education and related services during the 1998-1999 school year.

70. The Child's educational needs have been reasonably calculated to be met by an intensity IV special education program as defined in COMAR 13A.05.01.10E(5).

71. Special education and related services specified by the April 6, 1998 IEP can be provided by a placement for the Child at the Herbert Hoover Middle School.

72. In addition to offering a placement for the Child at the Herbert Hoover Middle School during the 1998-1999 school year, MCPS offered a placement for the Child at the Robert Frost Middle School.

73. Special education and related services specified by the April 6, 1998 IEP can be provided by a placement for the Child at the Robert Frost Middle School.

74. The special education and related services called for by the April 6, 1998 IEP and the placements offered by MCPS would provide the Child with an opportunity for a FAPE during the 1998-1999 school year.

75. The travel time from the Child's home to the McLean School of Maryland would be approximately fifteen (15) minutes.

DISCUSSION

The purpose of the IDEA is to assure that all children with disabilities have available to them a free appropriate public education designed to meet their unique needs. 20 U.S.C. § 1400(c) (1997). The IDEA provides federal assistance to state and local agencies in the education of children with disabilities. As a condition of such assistance, the recipient agencies must have "in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(a)(1) (1997).

"Appropriate" in the context of a FAPE has been interpreted to mean personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The IDEA only requires that the child be able to benefit from instruction that he

receives, not that he is able to maximize his potential or that he receive optimal services. *Board of Educ. of the Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 3048 (1982); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990).

In *Rowley*, *supra*, the Supreme Court set forth the standards a local education agency must meet in order to satisfy its obligation to provide a FAPE to a student with disabilities. The Supreme Court said the first inquiry is whether a school district has complied with the procedures set forth in the IDEA. The second inquiry is whether the IEP developed through the IDEA's procedures and the resulting placement was reasonably calculated to enable a student with disabilities to receive appropriate educational benefit.

The Parents in this case believe that the Intensity IV level special education program and the placement offered by MCPS at the Herbert Hoover Middle School or the Robert Frost Middle School will not meet the Child's educational needs for the 1998-1999 school year. The Parents assert that the Child's attendance at the McLean School of Maryland will be necessary for him to receive an appropriate education for the 1998-1999 school year.

MCPS contends, however, that placement of the Child at the Herbert Hoover Middle School or the Robert Frost Middle School would be appropriate and would provide him with significant, measurable educational benefit; therefore, it is not their responsibility to fund a placement for the Child at the McLean School of Maryland. The ALJ finds MCPS's argument persuasive based upon the following analysis.

PROCEDURAL ANALYSIS

The development of an IEP triggers "extensive due process requirements" imposed by the IDEA and when a local education agency fails to comply with required procedures, "serious procedural noncompliance can by itself support a finding that the child has not been provided with a free appropriate public education." *Ball v. Vance City Bd. of Education*, 774 F.2d 629, 634 (4th Cir. 1985). However, *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990) held that a student is not denied a FAPE unless the procedural violations are serious and cause a loss of "educational opportunity." In its most recent case to address this issue, the U.S. Court of Appeals for the Fourth Circuit held that:

> [T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.

Gadsby v. Grasmick, 109 F.3d 940, 956 (4th Cir. 1997).

The Parents have not argued that the Child's procedural rights were violated under the IDEA.

The record has not revealed any violation of procedural safeguards that actually interfered with the opportunity of the Child for a FAPE for the 1998-1999 school year.

The ALJ believes that the identification of the Child by MCPS as a student with disabilities, the development of the April 6, 1998 IEP, and the placement(s) offered for

the Child for the 1998-1999 school year are consistent with the due process requirements imposed by the IDEA.

EDUCATIONAL BENEFIT ANALYSIS

The U.S. Supreme Court discussed the FAPE concept in *Board of Educ. of the Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. at 198, 102 S.Ct. at 3046 (1982):

> We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children." . . .

The Court continued:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend million of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive service . . . as may be required to assist the handicapped child to *benefit* from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by [the IDEA]

> consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Id., 458 U. S. at 200-01, 102 S.Ct. at 3048.

In juxtaposition to requirements for individualized instruction, the IDEA also mandates that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." 20 U.S.C. § 1412(a)(5)(A). Such inclusion is required by State and federal regulations which have been promulgated to implement the requirements of the IDEA. 34 C.F.R. § 300.550-300.556; COMAR 13A.05.01.02B(3)(a).

"Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of [the IDEA]." *DeVries v. Fairfax County School Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). Nevertheless, it has been recognized that the strong preference for the mainstreaming and inclusion of disabled students must yield where education in the regular classroom cannot meet a disabled student's particularized and individual needs. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1044-1045 (5th Cir. 1989).

The task facing many courts and administrative tribunals in special education cases is reconciling the IDEA's preference for mainstreaming with its mandate that instruction be tailored to unique requirements of each disabled student. If supplementary aids and services cannot render a regular school setting appropriate for

implementation of a student's IEP, then the IDEA requires that the student not be placed in the regular school.

Another factor must be added to this analysis. In seeking to provide the LRE which is consistent with a disabled child's individual needs, a local education agency must also seek a placement which is as close as possible to the student's home. 34 C.F.R. § 300.552(a)(3); COMAR 13A.05.01.08E(2)(b).

The IDEA does not guarantee any student "the best education, public or nonpublic, that money can buy" or "all [the] services necessary to maximize educational benefits." *Hessler v. State Board of Education of Maryland*, 700 F.2d 134, 139 (4th Cir 1983), citing *Rowley*, *supra*. On the contrary, the question is whether the education that the Child would receive at the placement(s) proposed would be "reasonably calculated to enable [a student] to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204, 102 S.Ct. at 3049. What is required, quite simply, is an appropriate education. *See also, COMAR* 13A.05.01.03.

In contrast to the procedural inquiry, the determination of whether a student is receiving, or could receive, beneficial instruction under a proposed IEP and placement is a somewhat more obscure analysis. No bright line test has been created to establish whether a student is progressing or could progress educationally. *Conklin v. Anne Arundel County Board of Education*, 946 F.2d 306, 313 (4th Cir. 1991) The ALJ is left to assess the evidence to determine whether it was more likely than not that the April 6, 1998 IEP and the placement(s) offered for the Child by the MCPS were reasonably calculated to enable him to receive appropriate educational benefit in the LRE.

There are experts on both sides in this case who have testified with opposing points of view. The credentials of all of those experts, in their respective fields, were impressive. Because each side's experts have diverging views on the question of what the Child's needs were and which placement would afford the requisite educational benefit for the Child, an assignment of the burden of proof in this case becomes critical.

There is no clear authority establishing which party bears the burden of proof on whether an IEP prepared for a student with a disability affords the student an opportunity for a FAPE. The case law provides support for assigning that burden to either party.

"In administrative and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed." *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533 (3rd Cir. 1995) (quoting *Oberti v. Board of Education*, 995 F.2d 1204, 1219 (3rd Cir. 1993)). "The School District had the burden of proving compliance with the IDEA at the administrative hearing, including the appropriateness of its evaluation." *Seattle School District No. 1 v. B.S.* 82 F.3d 1493, 1498 (9th Cir. 1996). *But See: Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990) (The burden of proof rests with the party attacking the student's IEP); and *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986) (The party attacking an IEP bears the burden of showing why the educational setting and IEP are not appropriate.)

In *Alamo Heights*, the Court of Appeals for the Fifth Circuit explained the rationale for its view on the assignment of the burden of proof:

> [The IDEA] "place[s] primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parent." In deference to this statutory scheme and the reliance it places on the expertise of local education authorizes, . . . [The IDEA] creates a "presumption in favor of the educational placement established by a [student's IEP]," and "the party attacking its terms should bear the burden of showing why the educational setting established by the [IEP] is not appropriate."

790 F.2d at 1158 (quoting *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983)). "As the Court made clear in *Rowley*, once a procedurally proper IEP has been formulated, a reviewing [authority] should be reluctant indeed to second-guess the judgment of education professionals. 458 U.S. at 207-208, 102 S.Ct. at 3051-52." *Tice v. Botetcourt*, 908 F.2d 1200, 1207 (4th Cir. 1992).

Mindful of the reluctance expressed by the Court of Appeals for the Fourth Circuit in *Tice v. Botetcourt*, "to second-guess the judgement of education professionals," the ALJ believes that the rationale expressed by the Court of Appeals for the Fifth Circuit in *Alamo Heights*, is most instructive in determining which party should have the burden of proof in this case.

There has been a properly formulated IEP prepared for the Child by MCPS. There has been no demonstration of any violation of a procedural safeguard for the Parents and the Child under the IDEA. Where there has been an IEP formulated with no procedural safeguards violated, the party attacking the IEP should bear the burden of

showing why the IEP and the educational setting are not appropriate.

In the matter *sub judice*, the Parents bear the burden of persuasion in establishing that the IEP prepared for the Child by MCPS and/or the placement(s) offered for the Child for the 1998-1999 school year fail to afford the Child an opportunity for a FAPE.[6]

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[6] On an entirely different footing, there is another reason to assign the burden of proof in this matter to the Parents.

The Parents contend that they are seeking only what they are entitled to under the IDEA. Under the IDEA, the parents and the local education agency should be equal partners in educating a student with disabilities.

On November 7, 1997, the Child's mother contacted MCPS in order to have the Child identified as a student with disabilities under the IDEA. On that date, the Child's mother indicated to a MCPS teacher that she had to find another private school for the Child to attend. During December 1997, the Parents were in contact with the McLean School of Maryland. On December 30, 1997, the Child, through his Parents, applied for admission to the McLean School of Maryland. On or about March 1, 1998, the Parents were notified by the McLean School of Maryland that the Child had been accepted as a student in the 8th Grade for the 1998-1999 school year. By March 16, 1998, the Parents had paid a non-refundable $750.00 enrollment fee to the McLean School of Maryland to guarantee placement of the Child at that school for the 1998-1999 school year. On March 13, 1998, MCPS sent notice of the second ARD committee meeting to the Parents.

At the time the Parents paid a non-refundable $750.00 enrollment fee to the McLean School of Maryland, the Parents knew that the ARD committee meeting that was to prepare an IEP and determine a placement for the Child for the 1998-1999 school year had not yet taken place. The Parents and their attorney attended the April 6, 1998 ARD Committee meeting. This was a mock effort on the part of the Parents. Before the April 6, 1998 ARD Committee meeting, the Parents had already enrolled the Child at the McLean School of Maryland for the 1998-1999 school year. At the April 6, 1998 ARD Committee meeting, the Parents indicated that they would review the goals and objectives of the IEP, have private consultants review the IEP, visit the schools to

(Continued on following page)

The Parents obtained independent assessments of the Child at their own expense. The Parents submitted copies of the reports of those assessment to MCPS. When a parent obtains an independent educational evaluation at private expense, the results of the examination must be considered by the public agency in any decision made with respect to the provision of a FAPE. 34 C.F.R. 300.503(c). The regulation requires a local education agency to consider such a report, but it is within the discretion of that agency to accept or reject its findings, in whole or part. The independent assessments of the Child were extensively reviewed and considered by MCPS. MCPS accepted the independent psycho-educational evaluation of the Child but rejected the educational setting recommended. MCPS accepted, in-part, the independent speech-language assessment of the Child but rejected the educational setting recommended.

Well qualified witnesses testified on behalf of MCPS that the special education and related services identified

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observe the placements offered, and then re-contact MCPS. The Parents did not recontact MCPS and request any additional services and or goals be added to the Child's IEP for the 1998-1999 school year.

These events strongly suggests a design by the Parents to simply obtain funding from MCPS for their predetermined decision to have the Child enter the 8th Grade at the McLean School of Maryland. The Parents never approached their interaction with MCPS as a partnership in educating the Child as a student with disabilities. The Parents may have followed the letter of their obligations under the IDEA, however, their activities are inconsistent with the congressional intent behind that statute. On this additional basis, the Parents should bear the burden of proof in establishing that the IEP prepared for the Child by MCPS and/or the placement(s) offered for the Child for the 1998-1999 school year fail to afford the Child an opportunity for a FAPE.

by the April 6, 1998 IEP are appropriate to meet the Child's educational needs, that his IEP can be implemented at the Herbert Hoover Middle School or the Robert Frost Middle School, that his placement at either of those schools would be appropriate, and that the Child would obtain significant, measurable benefit during the 1998-1999 school year if he attended either of those schools.[7]

The Parents allege that the April 6, 1998 IEP is not appropriate based upon its intensity of service, provision of services in an "inclusion model" setting, and mainstreaming components. They assert that the Child requires a smaller class size, more intensive supervision, and, a more restrictive setting than available at the Herbert Hoover Middle School or the Robert Frost Middle School.

Ruth B. Spodak, Ph.D., testified as an expert witness for the Parents. Dr. Spodak was admitted as an expert witness in psychology and learning disabilities. During her testimony, she opined that the Child would receive only

[7] The Parents contend that the testimony of the MCPS experts should be discounted because there is no indication that the expertise of those school officials has been brought to bear on the individual needs of the Child. In this regard, the Parents, at closing argument, cited *McKenzie v. Smith*, 771 F.2d 1527 (1985) as instructive. The facts in *McKenzie v. Smith* are distinguishable. In the cited case, the trial court found that the two primary expert witnesses called on behalf of the local education agency had not met the student or his parents, neither had any personal knowledge of the student, and both those primary expert witnesses admitted that they had not viewed all of the files and reports relating to the student. Similar foundational discrepancies in the opinions from MCPS expert witnesses have not been demonstrated in this record. In fact, in the matter *sub judice*, the opposite has been well established. (Findings of Fact #23, #25, #31, #32, #33, #35, #36, #39 & #40)

minimal educational benefit, not the appropriate benefit, in a placement at the Herbert Hoover Middle School or the Robert Frost Middle School. Dr. Spodak would not recommend that the Child be provided special education services in an "inclusion model" setting. According to Dr. Spodak, the Child's academic educational needs can only be met in small, self-contained special education classes. Small, self-contained special education classes are needed to minimize distractions in the academic setting and permit the Child to be available for learning.

Dr. Spodak did acknowledge, during cross examination, that the presence of a special educator in the "inclusion model" setting might minimize the distraction that she feared, depending on the role of the special educator and how effective the special educator was. Dr. Spodak acknowledged also that she had not observed the staff and special education services provided in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School. Insofar as Dr. Spodak has no first-hand knowledge on how a special educator in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School is used, and how effective the special educators at those schools are, the ALJ questions the probative value of her opinion that the Child could not receive other than minimal educational benefit in either of those schools.

The ALJ noted that the report of the psycho-educational evaluation of the Child from the offices of Ruth B. Spodak, Ph.D., & Associates, is not as definitive as the instant opinion offered by Dr. Spodak during the due process hearing, itself. That report (MCPS Exhibit #7) states in part:

> [The Child] will do best in a small, structured setting, where expectations are clear and consistent.

During cross-examination, Dr. Spodak revealed that she had only met with the Child for approximately ten (10) minutes. Diane Toby, Ph.D., psychologist, and Deanna Greenstein, Ph.D., a psychology associate, conducted the actual psycho-educational evaluation of the Child at the offices of Ruth B. Spodak, Ph.D. & Associates. After the evaluation of the Child, Dr. Spodak, Diane Toby, and Deanna Greenstein produced a written report. Dr. Spodak wrote 2 of the 19 pages in that report. Dr. Spodak wrote the portion of the report detailing the background information on the Child. The quotation from that report, listed above, was not taken from the portion of the report written by Dr. Spodak.

If, at the time the psycho-educational evaluation report was actually written, it was the consensus of Dr. Spodak, Diane Toby, and Deanna Greenstein that the Child *must* be educated in small, self-contained special education classes, the ALJ would have expected to see that sort of statement as one of the recommendations in the report. Because of the absence of that sort of statement in the report, and the fact that Dr. Spodak, herself, had not conducted the actual evaluation of the Child, the ALJ further questions the probative value of Dr. Spodak's opinion that the Child could receive only minimal educational benefit in anything other than small, self-contained special education classes.

Barbara J. Butera, School Psychologist, MCPS, testified on behalf of the MCPS. Barbara Butera was admitted as an expert witness in school psychology.

Barbara Butera's observation and psychological assessment of the Child were consistent with the assessment of the Child presented in the report on the Child from the office of Ruth B. Spodak, Ph.D & Associates. However, Barbara Butera opined that the April 6, 1998 IEP was appropriate to meet the Child's educational needs and that the Child would obtain significant, measurable benefit during the 1998-1999 school year if he attended the Herbert Hoover Middle School or the Robert Frost Middle School.

Carol A. Kamara, Ph.D, testified as an expert witness for the Parents. Dr. Kamara was admitted as an expert witness in Speech/Language Pathology and Audiology. Dr. Kamara was the key witness for the Parents. Dr. Kamara testified that the Child has a unique problem with "central auditory processing." According to Dr. Kamara, to address his "central auditory processing" problem, the Child's educational needs can only be met in small, self-contained special education classes. Dr. Kamara was critical of the proposed placement in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School because of the risk of simultaneous messages, distractions, and possible distortions of audio signals in that setting. Dr. Kamara further testified that the Child's critical need – his "central auditory processing" problem – was not addressed in the April 6, 1998 IEP.

In her opinion, Dr. Kamara relied heavily on the results of one formal test of the Child known as the "SCAN-A." However, during cross-examination, Dr. Kamara acknowledged that no test should be treated as conclusive in determining what a student's performance is, or will be, in the real education environment. In addition, Dr. Kamara acknowledged that it was not possible to

determine if the Child's score on the "SCAN-A" was the result of the his "central auditory processing" problem or the result of his ADHD, or a combination of same.

Pamala Zahra, Speech/Language Pathologist, Herbert Hoover Middle School, MCPS, testified on behalf of the MCPS. Pamala Zahra was admitted as an expert witness in Speech/Language Pathology. She indicated that, in her opinion, based on an informal assessment that she conducted, that the Child did not exhibit evidence of a "central auditory processing" problem.

Because it is not possible to ascertain if the Child's score on the "SCAN-A" was the result of a "central auditory processing" problem or the result of his ADHD, and because the child did not exhibit evidence of a "central auditory processing" problem during an informal assessment conducted by MCPS, the ALJ questions the probative value of Dr. Kamara's opinion that the Child has a need – "central auditory processing" – that was not addressed in the April 6, 1998 IEP.

Pamala Zahra, testifying on behalf of the MCPS, indicated that, in a relative sense, overall, the Child suffers from a mild speech-language disability. Pamala Zahra explained her reasons for that view. The Child has areas of strengths and weaknesses in his ability to communicate. Dr. Kamara would not offer an opinion along the same line. That is whether, overall, in a relative sense, the Child has a mild, moderate, or severe speech-language disability. Dr. Kamara explained that she would not reduce to such simple terms the unique speech-language characteristics of the Child as a student with disabilities. The ALJ was not impressed, by what the ALJ perceived to be, evasion of that question by Dr. Kamara. The ALJ

infers that an answer from Dr. Kamara to that question would not have been inconsistent with the opinion from Pamala Zahra.

The ALJ noted that the report of the comprehensive speech-language assessment from Dr. Kamara, lends more support to the argument advanced on behalf of the MCPS, than her instant opinion offered during the due process hearing, itself. That report (MCPS Exhibit #3) states in part:

> *[The Child] demonstrated many average and borderline average skills that might seem to allow him to be placed appropriately in a regular education setting with some special education support.* However, his reading issues posed tremendous concern because the opportunity to receive individualized remedial reading instruction in a regular education setting typically does not occur, and he must have a specialized type of remedial instruction in reading if he is going to effectively use reading to learn. His serious needs in reading, writing, spelling, and math, indicate that he should be placed in a self-contained, full-day special education program. (emphasis added)

Dr. Kamara acknowledged also that she had not observed the staff and special education services provided in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School. Because Dr. Kamara had no opportunity to view the "inclusion model" setting at those schools, the ALJ further questions the probative value of her opinion that the Child will not be able to receive the remedial instruction he needs in the placement(s) proposed by MCPS.

There is an inherent concern in evaluating testimony from experts such as Dr. Spodak and Dr. Kamara. Their knowledge of special education law is extensive. Their testimony during the instant hearing is couched in terms taken from the case law. Their testimony purports to be consistent with the recommendations listed in their written assessments of the Child. Those written assessments were created before the Parents requested a due process hearing. It is common sense to expect that recommendations from a private consultant, who conducts an assessment of a student with disabilities, and who is privately paid on behalf of that student, would be, and should be, designed to maximize that student's potential, not simply to allow "educational benefit" to the student with disabilities so that the student receives the "basic floor of opportunity" provided for by the IDEA. *Board of Education v. Rowley*, 458 U.S. at 200-01, 102 S.Ct. at 3048.

The Parents suggest that the April 6, 1998 IEP as written does not include a required related service. The Parents point out that the April 6, 1998 IEP provides for speech-language therapy for the Child in a small group setting. The Parents contend that the report from Dr. Kamara specifies that the Child needs speech-language therapy on an individual basis. In pertinent part, that report (MCPS Exhibit #3) reads:

> [The Child] continues to need speech-language therapy to address a number of auditory processing, memory, syntactic, word retrieval, and organizational pragmatic deficits. . . . An individual 45-60 minute therapy session one time per week should be adequate to meet his needs, but if 30-minute sessions are provided, then he should receive two sessions each week.

> *His linguistic rule issues are not unusual and may be addressed in a small group of students who have similar issues, so if he is put into two 30-minute sessions, one of those might be in a small group setting.*
>
> (emphasis added)

Dr. Kamara states in her report that the Child's linguistic issues are not unusual and might be addressed in a small group setting.

Pamala Zahra, testifying as an expert witness on behalf of the MCPS, opined that the 45 minutes of the speech-language therapy each week that would be provided for the Child in a small group setting of 2-5 students, in accordance with the April 6, 1998 IEP, would be adequate to meet the Child's needs for this related service.

The Parents have failed to persuade the ALJ that the Child needs speech-language therapy as a related service on an individual basis as opposed to the small group setting of 2-5 students as proposed by the MCPS.

As a student, the Child has strengths as well as weaknesses. Even without being coded as a special education student, without receiving any services from a qualified special educator, the Child achieved (admittedly with extensive classroom and testing accommodations), a passing grade in all his subjects for the third trimester of the 1997-1998 school year at the Green Acres School. On this record, the ALJ is skeptical of the Parents' assertion that the Child's educational environment must shift from a fully mainstreamed regular education class setting in all academic subjects in a private school to a very restrictive special education setting in all academic subjects during

the 1998-1999 school year in order for the Child to receive anything other than minimal educational benefit.

The Parents' claim has presented a contest of experts requiring a determination of the probative value of their opinion between opposing factions. The Parents carry the burden of proof on the merit of their claim. The Parents clearly believe that their son would receive greater educational benefit from an environment limited to a small number of disabled students which would be provided at the McLean School of Maryland. They may be correct. That, however, is not the standard by which the provision of a FAPE must be judged. The Parents have failed to persuade the ALJ that the April 6, 1998 IEP was not reasonably calculated to provide educational benefit, or that the placement(s) offered by MCPS are not appropriate to provide for the Child's educational needs in accordance with the IDEA.

The ALJ believes the April 6, 1998 IEP was reasonably calculated by MCPS to provide educational benefit and to meet the Child's educational needs, that his IEP can be implemented at the Herbert Hoover Middle School or the Robert Frost Middle School, and that the Child would obtain significant, measurable educational benefit during the 1998-1999 school year if he attended either of those schools. Having made this determination, the ALJ does not reach the question of whether, on this record, placement of the Child at the McLean School of Maryland during the 1998-1999 school year would be *more* appropriate.

The ALJ is not unsympathetic to the challenges that the special needs of the Child present to the Parents. A possibility exists that a program could be crafted at the

McLean School of Maryland, in fact, *more* educationally beneficial to the Child than what is reflected on the April 6, 1998 IEP. From a legal standpoint however, that is not the test that can be applied. MCPS is only required to offer the Child an opportunity for an *appropriate* education, not the ideal.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact and discussion, the ALJ concludes, as a matter of law that the goals and objectives, special education and related services, called for by the April 6, 1998 IEP, and the placement(s) for the Child offered by MCPS, affords the Child an opportunity for a FAPE for the 1998-1999 school year as required by the IDEA. 20 U.S.C. § 1400(c) (1997); Md. Code Ann., Educ. § 8-413 (1997).

ORDER

IT IS ORDERED THEREFORE, that the April 6, 1998 IEP, as proposed by MCPS for the Child be, and hereby is, AFFIRMED; and

IT IS FURTHER ORDERED, that the Parents' request for an order directing placement of the Child at the McLean School of Maryland for the 1998-1999 school year be, and hereby is, DENIED.

July 9, 1998 — /s/ S.J. Nichols

Date

Stephen J. Nichols
Administrative Law Judge

APPEAL RIGHTS

Any party aggrieved by this final Decision of the Maryland State Department of Education may appeal it by filing a petition for judicial review with the circuit court for the county where the child resides or the United States District Court for Maryland, without regard to the amount in controversy, within 180 days after the date that notice of the decision is sent, in accordance with Md. Code Ann., Educ. § 8-413 (1997).

APPENDIX

The following documents were admitted on behalf of MCPS:

MCPS # 1 – Parent Interview/Questionnaire.

MCPS # 2 – Educational history with attachments.

MCPS # 3 – Speech/Language Assessment, dated December 9, 1997.

MCPS # 4 – Secondary teacher referral/reports.

MCPS # 5 – Classroom observation, dated December 17, 1997.

MCPS # 6 – Correspondence to David Cross from Holly Parker, dated December 24, 1997.

MCPS # 7 – Psycho-Educational evaluation, dated January 1998.

MCPS # 8 – Correspondence to Parents from Mary Lee Phelps, dated January 7, 1998.

MCPS # 9 – Correspondence to Parents from Caroline Kursman, dated January 14, 1998.

MCPS # 10 – Correspondence to Caroline Kursman from Holly Parker, dated February 17, 1998.

MCPS # 11 – Special needs consultation, dated February 19, 1998.

MCPS # 12 – Classroom observation, dated February 19, 1998.

MCPS # 13 – Green Acres School record summary.

MCPS # 14 – Student screening profile worksheet.

MCPS # 15 – Correspondence with attachments to Parent from Caroline Kursman, dated February 26, 1998.

MCPS # 16 – Correspondence to Linda Brand from Holly Parker, dated March 5, 1998.

MCPS # 17 – Psychological evaluation review, dated March 12, 1998.

MCPS # 18 – Correspondence to Parents from Caroline Kursman, dated March 13, 1998.

MCPS # 19 – Correspondence to Caroline Kursman from Holly Parker, dated March 13, 1998.

MCPS # 20 – Speech/language assessment review, dated March 13, 1998.

MCPS # 21 – Educational assessment report review, dated March 15, 1998.

MCPS # 22 – Occupational therapy evaluation, dated March 18, 1998.

MCPS # 23 – Correspondence to Parents from Caroline Kursman, dated April 9, 1998, with attached 1998-99 IEP.

MCPS # 24 – Correspondence to Raymond Bryant from Holly Parker, dated May 5, 1998.

MCPS # 25 – Request for due process hearing, dated May 26, 1998.

MCPS # 26 – Correspondence to Holly Parker from Zvi Greismann, dated May 28, 1998.

MCPS # 27 – Brand chronology.

MCPS # 28 – Thayer chronology.

MCPS # 29 – Subpoena Duces Tecum to the Custodian of Records of The McLean School.

MCPS # 30 – Application for admission to The McLean School, dated December 30, 1997.

MCPS # 31 – Progress report from the Green Acres School, dated June 1998.

MCPS # 32 – Authorization of release of confidential information, dated December 19, 1997.

MCPS # 33 – Letter of acceptance from The McLean School, dated March 1, 1998.

The following documents were admitted on behalf of the Parents:

Parent # 1 – Request from mediation/due process hearing, dated May 26, 1998.

Parent # 2 – Correspondence to Raymond Bryant from Holly Parker, dated May 5, 1998.

Parent # 3 – Special needs consultation, dated February 19, 1998.

Parent # 4 – Psycho-Educational evaluation, dated January 1998.

Parent # 5 – Speech/language assessment, dated December 9, 1997.

Parent # 6 – Report cards for grades 6th and 7th.

Parent # 7 – Correspondence and progress report to Parents from Green Acres School sixth grade team, dated May 27, 1997.

Parent # 8 – Neuropsychological evaluation, dated January 24 26, 1995.

Parent # 9 – Psychological evaluation, dated August 24, 1991.

Parent # 10 – Speech/language progress/evaluation report, dated September & October 1990.

Parent # 11 – Speech/language re-evaluation, dated March 15, 1989.

Parent # 12 – Speech/language evaluation, dated August 5, 1988.

Parent # 13 – Occupational therapy evaluation, dated August 1, 1988.

Parent # 14 – Speech/language therapy progress report, dated August 1988.

Parent # 15 – Speech/language therapy progress report, dated June 22, 1997.

Parent # 16 – Correspondence to Parents from Nan Shapiro, dated May 5, 1998.

Parent # 17 – Comprehensive testing program report.

Parent # 18 – Review of assessment, dated March 1998.

Parent # 19 – List of SLP issues.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770
301-344-0632

MEMORANDUM

TO: Counsel of Record

FROM: Judge Peter J. Messitte

RE: *Schaffer v. Weast, et al.*
Civil Case No. PJM 99-15

DATE: October 29, 2004

* * *

The Court has reviewed the Joint Status Report of the parties as set forth in Counsels' letter of October 28, 2004.

The Court will STAY action in the proceedings pending the Supreme Court's action on Plaintiffs' Petition for Certiorari.

The Case will be ADMINISTRATIVELY CLOSED in the meantime.

Despite the informal nature of this ruling, it shall constitute an Order of Court and the Clerk is directed to docket it accordingly.

/s/
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

cc: Court File

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 24, 2004

No. 03-1030
CA-99-15-PJM

JERRY WEAST, Superintendent of
Montgomery County Public Schools;
BOARD OF EDUCATION OF
MONTGOMERY COUNTY

Plaintiffs-Appellants

v.

BRIAN SCHAFFER, a minor, by his parents
and next friends, Jocelyn and Martin Schaffer;
JOCELYN SCHAFFER; MARTIN SCHAFFER

Defendants-Appellees

- - - - - - - - - - - - - - - -

NATIONAL SCHOOL BOARDS ASSOCIATION;
MARYLAND ASSOCIATION OF BOARDS
OF EDUCATION; NORTH CAROLINA
SCHOOL BOARDS ASSOCIATION; SOUTH
CAROLINA SCHOOL BOARD ASSOCIATION;
VIRGINIA SCHOOL BOARDS ASSOCIATION

Amici Supporting Appellant

- - - - - - - - - - - - - - -

On Petition for Rehearing and Rehearing En Banc

- - - - - - - - - - - - - - -

Appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this

Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Wilkinson, Judge Luttig, and Judge Michael.

For the Court,

/s/ Patricia S. Connor
Patricia S. Conner
CLERK

20 USCS § 1400 (2004)

§ 1400. Short title; table of contents; findings; purposes

(a) Short title. This Act [20 USCS §§ 1400 et seq.] may be cited as the "Individuals with Disabilities Education Act".

(b) [Omitted]

(c) Findings. The Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) [enacted Nov. 29, 1975] –

(A) the special educational needs of children with disabilities were not being fully met;

(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;

(D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children

from having a successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975 [enacted Nov. 29, 1975], this Act [20 USCS §§ 1400 et seq.] has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this Act [20 USCS §§ 1400 et seq.] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by –

(A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible;

(B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this Act [20 USCS §§ 1400 et seq.] with other local, educational service agency, State,

and Federal school improvement efforts in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where they are sent;

(D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate;

(E) supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them –

(i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and

(ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible;

(F) providing incentives for whole-school approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs; and

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results.

(6) While States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) (A) The Federal Government must be responsive to the growing needs of an increasingly more diverse society. A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(B) America's racial profile is rapidly changing. Between 1980 and 1990, the rate of increase in the population for white Americans was 6 percent, while the rate of increase for racial and ethnic minorities was much higher: 53 percent for Hispanics, 13.2 percent for African-Americans, and 107.8 percent for Asians.

(C) By the year 2000, this Nation will have 275,000,000 people, nearly one of every three of whom will be either African-American, Hispanic, Asian-American, or American Indian.

(D) Taken together as a group, minority children are comprising an ever larger percentage of public school students. Large-city school populations are overwhelmingly minority, for example: for fall 1993, the figure for Miami was 84 percent; Chicago, 89 percent; Philadelphia, 78 percent; Baltimore, 84 percent; Houston, 88 percent; and Los Angeles, 88 percent.

(E) Recruitment efforts within special education must focus on bringing larger numbers of minorities into the profession in order to provide appropriate practitioner knowledge, role models, and sufficient manpower to address the clearly changing demography of special education.

(F) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring

in many parts of our Nation. In the Nation's 2 largest school districts, limited English proficient students make up almost half of all students initially entering school at the kindergarten level. Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education. The Department of Education has found that services provided to limited English proficient students often do not respond primarily to the pupil's academic needs. These trends pose special challenges for special education in the referral, assessment, and services for our Nation's students from non-English language backgrounds.

(8) (A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) Poor African-American children are 2.3 times more likely to be identified by their teacher as having mental retardation than their white counterpart.

(D) Although African-Americans represent 16 percent of elementary and secondary enrollments, they constitute 21 percent of total enrollments in special education.

(E) The drop-out rate is 68 percent higher for minorities than for whites.

(F) More than 50 percent of minority students in large cities drop out of school.

(9) (A) The opportunity for full participation in awards for grants and contracts; boards of organizations receiving funds under this Act [20 USCS §§ 1400 et seq.]; and peer review panels; and training of professionals in the area of special education by minority individuals, organizations, and historically black colleges and universities is essential if we are to obtain greater success in the education of minority children with disabilities.

(B) In 1993, of the 915,000 college and university professors, 4.9 percent were African-American and 2.4 percent were Hispanic. Of the 2,940,000 teachers, prekindergarten through high school, 6.8 percent were African-American and 4.1 percent were Hispanic.

(C) Students from minority groups comprise more than 50 percent of K-12 public school enrollment in seven States yet minority enrollment in teacher training programs is less than 15 percent in all but six States.

(D) As the number of African-American and Hispanic students in special education increases, the number of minority teachers and related service personnel produced in our colleges and universities continues to decrease.

(E) Ten years ago, 12 percent of the United States teaching force in public elementary and secondary schools were members of a minority group. Minorities comprised 21 percent of the national population at that time and were clearly underrepresented then among employed teachers. Today, the elementary and secondary teaching force is 13 percent minority, while one-third of the students in public schools are minority children.

(F) As recently as 1991, historically black colleges and universities enrolled 44 percent of the African-American teacher trainees in the Nation. However, in 1993, historically black colleges and universities received only 4 percent of the discretionary funds for special education and related services personnel training under this Act [20 USCS §§ 1400 et seq.].

(G) While African-American students constitute 28 percent of total enrollment in special education, only 11.2 percent of individuals enrolled in preservice training programs for special education are African-American.

(H) In 1986-87, of the degrees conferred in education at the B.A., M.A., and Ph.D. levels, only 6, 8, and 8 percent, respectively, were awarded to African-American or Hispanic students.

(10) Minorities and underserved persons are socially disadvantaged because of the lack of opportunities in training and educational programs, undergirded by the practices in the private sector that impede their full participation in the mainstream of society.

(d) Purposes. The purposes of this title [20 USCS §§ 1400 et seq.] are –

(1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

HISTORY:

(April 13, 1970, P.L. 91-230, Title VI, Part A, § 601, as added June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 37.)

20 USCS § 1415 (2004)

§ 1415. Procedural safeguards

(a) Establishment of procedures. Any State educational agency, State agency, or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures. The procedures required by this section shall include –

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency –

(A) proposes to initiate or change; or

(B) refuses to initiate or change; the identification, evaluation, or educational placement of the child, in accordance with subsection (c), or the provision of a free appropriate public education to the child;

(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

(5) an opportunity for mediation in accordance with subsection (e);

(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential) –

(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B) that shall include –

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) Content of prior written notice. The notice required by subsection (b)(3) shall include –

(1) a description of the action proposed or refused by the agency;

(2) an explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USCS §§ 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USCS §§ 1411 et seq.].

(d) Procedural safeguards notice.

(1) In general. A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum –

(A) upon initial referral for evaluation;

(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6).

(2) Contents. The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to –

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) opportunity to present complaints;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that State);

(L) civil actions; and

(M) attorneys' fees.

(e) Mediation.

(1) In general. Any State educational agency or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k).

(2) Requirements. Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process –

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part [20 USCS §§ 1411 et seq.]; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with –

(i) a parent training and information center or community parent resource center in the State established under section 682 or 683 [20 USCS § 1482 or 1483]; or

(ii) an appropriate alternative dispute resolution entity; to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(f) Impartial due process hearing.

(1) In general. Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(2) Disclosure of evaluations and recommendations.

(A) In general. At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(B) Failure to disclose. A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitation on conduct of hearing. A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

(g) Appeal. If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards. Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded –

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 617(c) [20 USCS § 1417(c)] (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 612(a)(21) [20 USCS § 1412(a)(21)]).

(i) Administrative procedures.

(1) In general.

(A) Decision made in hearing. A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2) of this subsection.

(B) Decision made at appeal. A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action.

(A) In general. Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements. In any action brought under this paragraph, the court –

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees.

(A) In general. The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees. In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

(C) Determination of amount of attorneys' fees. Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services.

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if –

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) Exception to prohibition on attorneys' fees and related costs. Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees. Except as provided in subparagraph (G), whenever the court finds that –

(i) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7);

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees. The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement. Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting.

(1) Authority of school personnel.

(A) School personnel under this section may order a change in the placement of a child with a disability –

(i) to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and

(ii) to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if –

(I) the child carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or a local educational agency; or

(II) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency.

(B) Either before or not later than 10 days after taking a disciplinary action described in subparagraph (A) –

(i) if the local educational agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in subparagraph (A), the agency shall convene an IEP meeting to develop an assessment plan to address that behavior; or

(ii) if the child already has a behavioral intervention plan, the IEP Team shall review the plan and modify it, as necessary, to address the behavior.

(2) Authority of hearing officer. A hearing officer under this section may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer –

(A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;

(B) considers the appropriateness of the child's current placement;

(C) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(D) determines that the interim alternative educational setting meets the requirements of paragraph (3)(B).

(3) Determination of setting.

(A) In general. The alternative educational setting described in paragraph (1)(A)(ii) shall be determined by the IEP Team.

(B) Additional requirements. Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall –

(i) be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(ii) include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.

(4) Manifestation determination review.

(A) In general. If a disciplinary action is contemplated as described in paragraph (1) or paragraph (2) for a behavior of a child with a disability described in either of those paragraphs, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the local educational agency that applies to all children –

(i) not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under this section; and

(ii) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(B) Individuals to carry out review. A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.

(C) Conduct of review. In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team –

(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including –

(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

(II) observations of the child; and

(III) the child's IEP and placement; and

(ii) then determines that –

(I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(5) Determination that behavior was not manifestation of disability.

(A) In general. If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to

children without disabilities, except as provided in section 612(a)(1) [20 USCS § 1412(a)(1)].

(B) Additional requirement. If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

(6) Parent appeal.

(A) In general.

(i) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

(ii) The State or local educational agency shall arrange for an expedited hearing in any case described in this subsection when requested by a parent.

(B) Review of decision.

(i) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

(ii) In reviewing a decision under paragraph (1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2).

(7) Placement during appeals.

(A) In general. When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

(B) Current placement. If a child is placed in an interim alternative educational setting pursuant to paragraph (1)(A)(ii) or paragraph (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in subparagraph (C).

(C) Expedited hearing.

(i) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the local educational agency may request an expedited hearing.

(ii) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing

officer, the hearing officer shall apply the standards set out in paragraph (2).

(8) Protections for children not yet eligible for special education and related services.

(A) In general. A child who has not been determined to be eligible for special education and related services under this part [20 USCS §§ 1411 et seq.] and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this part [20 USCS §§ 1411 et seq.] if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if –

(i) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(ii) the behavior or performance of the child demonstrates the need for such services;

(iii) the parent of the child has requested an evaluation of the child pursuant to section 614 [20 USCS § 1414]; or

(iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

(C) Conditions that apply if no basis of knowledge.

(i) In general. If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B)) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this part [20 USCS §§ 1411 et seq.], except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(9) Referral to and action by law enforcement and judicial authorities.

(A) Nothing in this part [20 USCS §§ 1411 et seq.] shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(10) Definitions. For purposes of this subsection, the following definitions apply:

(A) Controlled substance. The term "controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug. The term "illegal drug" –

(i) means a controlled substance; but

(ii) does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(C) Substantial evidence. The term "substantial evidence" means beyond a preponderance of the evidence

(D) Weapon. The term "weapon" has the meaning given the term "dangerous weapon" under paragraph

(2) of the first subsection (g) of section 930 of title 18, United States Code.

(l) Rule of construction. Nothing in this title [20 USCS §§ 1400 et seq.] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [29 USCS §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part [20 USCS §§ 1411 et seq.], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part [20 USCS §§ 1411 et seq.].

(m) Transfer of parental rights at age of majority.

(1) In general. A State that receives amounts from a grant under this part [20 USCS §§ 1411 et seq.] may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) –

(A) the public agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule. If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this part [20 USCS §§ 1411 et seq.].

HISTORY:

(April 13, 1970, P.L. 91-230, Title VI, Part B, § 615, as added June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 88.) (As amended April 29, 1999, P.L. 106-25, § 6(a), 113 Stat. 49.)